

OMNI DEVELOPMENT CORPORATION,)	AGBCA Nos. 97-203-1
)	98-182-1
Appellant)	
)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

May 25, 2005

BEFORE POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for Board by Administrative Judge POLLACK. Separate dissenting opinion by Administrative Judge VERGILIO.

On September 10, 1997, the Board received a notice of appeal, docketed as AGBCA No. 97-203-1, submitted by Omni Development Company (later corrected to that of the lessor, Omni Development Corporation)(Omni or Appellant) of Spanish Fork, Utah. Omni, the lessor of two distinct spaces to the Government, disputed the termination for default of one portion of its lease (#57-84M8-7-002) with the U. S. Department of Agriculture (USDA), Forest Service (FS), Fishlake National Forest, Richfield, Utah.

On July 10, 1998, the Board received a second notice of appeal from Omni which the Board docketed as AGBCA No. 98-182-1. There, Omni disputed the denial by the Contracting Officer (CO) of Omni's claim for expenses and lost profits of \$2,203,767.25. On April 26, 2002, Omni filed a

Second Amended Complaint in AGBCA No. 98-182-1, where it modified its dollar claim to \$2,049,653. The claim was comprised of \$145,624 for lost rental income and \$1,904,029 for Omni's lost reversionary interest in the building.

The Board has jurisdiction over these timely-filed appeals, pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended.

An 8-day hearing on the appeal was held in Ogden, Utah in July 2003. The hearing was later continued in Ogden on July 31 and then concluded by telephone on September 23, 2003. That was followed by briefing from the parties. The record consists of the Appeal File (AF), as well as multiple exhibits from each party, Board exhibits and the transcripts of the proceedings. Transcript citations (Tr.) are to the month and day of the hearing and then the page. Due to health matters, the CO who issued the termination was unable to attend the hearing. She, however, had been deposed in August 2001, and her deposition is included in the record.

FINDINGS OF FACT

1. On November 8, 1995, the FS issued Solicitation for Offers (SFO), No. R4-95-22 (AF 59-110). Through that solicitation, the FS sought to lease approximately 25,000 square feet of space for (1) a fire center to be located near the airport in Richfield, Utah; and (2) a main office building (supervisor's office) to be located near Main Street in Richfield. The latter was to house a FS supervisor and other agencies. (AF 63.) The FS reserved the right to award separate leases for each of the two distinct spaces. The lease had a firm 10-year term, with two options to be exercised at the discretion of the FS. (AF 49-50, 55.)

2. The SFO, with modifications, was broken down into nine sections. The first dealt with matters such as the amount of space; location; lease term/termination; offer and due date; occupancy date; as well as price and evaluation. Section 2 dealt with award factors; Section 3 was titled Miscellaneous; while Sections 4 and 5 dealt with architectural requirements. Sections 6 through 9 contained the technical specifications. (AF 42-165.)

3. The SFO specified that the space was required to be ready for occupancy by November 1, 1996 (AF 63). However, the Government reserved the right to negotiate the possession date with any offeror.

4. Paragraph 1.9, AWARD provided:

Within 15 calendar days after award, the successful offeror/lessor shall provide to the CO [contracting officer] evidence of:

(a) A firm commitment of funds in an amount sufficient to perform the work required under this leasehold agreement.

(AF 66-67.)

5. Paragraph 1.6, HOW TO OFFER (AF 67), the SFO called for proposers to submit various items with the offer. Among the items were:

- 8(a) Satisfactory evidence of a conditional commitment of funds in an amount necessary to prepare the space. Such commitments must be signed by an authorized financial officer and at a minimum must state: amount of loan; term in years; annual percentage rate; length of loan commitment.
- (b) Evidence of ownership or control of site, (i.e. deed, partnership agreement, corporate resolution, etc.)

In its offer, the Appellant certified that its interest in the proposed property (identified as USDA Bldg, 8th No & Main (approx), Richfield, Utah) was that of owner (AF 113-14).

6. Paragraph 3.9, CONSTRUCTION SCHEDULE (AF 69), the SFO provided:

A. Within 15 days after award of the lease contract, the successful offeror shall submit to the CO a tentative construction schedule giving the dates on which the various phases of construction will be completed to coincide with the Government's required occupancy date (see paragraph entitled "Occupancy Date"). The finalized schedule is to be submitted no later than 30 days after award.

B. The schedule is to include timing for completion of design and construction milestones, including but not limited to, (1) submittal of preliminary plans and specifications, (2) submittal of other working drawings, (3) issuance of a building permit, (4) completed construction documents, (5) start of construction, (6) completion of principal categories of work, (7) phased completion, and availability of occupancy of each portion of the Government space (by floor, block, or other appropriate category), and (8) final construction completion.

7. Under General Clauses at Paragraph 11, DEFAULT IN DELIVERY (June 1994) (48 CFR 552.270-28), the SFO stated:

(a) With respect to Lessor's obligation to deliver the premises substantially complete by the delivery date (as such date may be modified pursuant to this lease), time is of the essence. If the Lessor fails to prosecute the work with the diligence that will insure its substantial completion by the delivery date or fails to substantially complete the work by such date, the Government may by notice to the Lessor terminate this lease, which termination shall be effective when received by Lessor . . .

The clause then continued dealing with the Government damage remedies, which are not germane to the issue before us. The clause, however, did then provide at subparagraph (c) the following:

(c) Notwithstanding paragraph (a) of this clause, this lease shall not be terminated under this clause nor the Lessor charged with damages under this clause, if (1) the delay in substantially completing the work arises from excusable delays and (2) the Lessor within 10 days from the beginning of any such delay (unless extended in writing by the Contracting Officer) provides notice to the Contracting Officer of the causes of delay. . . .

(AF 125-26.)

8. The SFO contained Paragraph 16, DEFAULT BY LESSOR DURING THE TERM (August 1992), (48 CFR 552.270-33). The clause stated that failure to perform any requirement of the lease constitutes a default “provided any such failure shall remain uncured for a period of thirty (30) days next following Lessor’s receipt of notice thereof from the Contracting Officer or an authorized representative.” (AF 127 (Para. 16).) The solicitation defines “notice” to mean “written notice sent by certified or registered mail, Express Mail or comparable service, or delivered by hand. Notice shall be effective on the date delivery is accepted or refused.” (AF 123 (Para. 1), 48 CFR 552.270-10(I), Definitions (Aug. 1992).)

9. The SFO specified at Paragraph 20 that the “Government will accept the space and the lease term will begin after determining that the space is substantially complete and contains the required occupiable square footage” (AF 127 (Para. 20)).

10. The SFO contained at Paragraph 7, NO WAIVER (48 CFR 552.270-37) (August 1992). It stated that “No failure by either party to insist upon the strict performance of any provision of this lease or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent or other performance by either party during the continuation of any such breach shall constitute a waiver of any such breach of such provision.” (AF 125.)

11. The SFO contains at Paragraph 37, DISPUTES (AF 136) (48 CFR 552.233-1) (Dec. 1991). (AF 136.)

12. At the time the SFO was issued, the FS was leasing space from Peterson Brothers Investments for the supervisor’s office at a site in Richfield, Utah. The lease was due to expire in October 1996. (App 3.)

13. In the fall of 1995, Mr. Robert Quayle learned about the SFO (App 68, para. 5). He met with three business acquaintances, Arlyn Rounds, Sherwin Kirby and Duane Koyle, about submitting an offer to construct an office building to house the fire center and supervisor’s office. At the time Mr. Quayle considered his association with the three to be a partnership, although they had not executed a formal agreement. (App 68, para. 5.)

14. Also in the fall of 1995, Mr. Quayle discussed acquiring land for the project with Mr. Woody Farnsworth, the City Manager of Richfield, and with a local company (Jenson Brothers) as to placing the building on a privately held site. The Jenson site was the original site proposed to the FS by Omni. (App 68, para. 6-7.)

15. On January 3, 1996, Mr. Quayle submitted Omni's first proposal to the FS for the lease. In the proposal, Robert Quayle of Robert D. Quayle Associates, certified that Quayle Associates was both a "partnership" and the "Recorded Owner" of the proposed building site. Mr. Quayle submitted an offer for lease of 28,971 square feet at \$10.44 a square foot, the building to be provided within 300 days of award. The offer allowed termination by the lessee after 10 years with 60 days notice. (AF 63, 113-14; App 68, para. 9.)

16. By letter dated April 23, 1996, the CO, Ms. Carolyn Lippire, wrote to Mr. Quayle and accepted Omni's offer for both the fire center and main (supervisor's) building. A meeting was arranged, at which the Government hoped to "finalize the lease, discuss space layout and coordinate between the Forest Service, the lessor and the other agencies involved, as well as the time frames." As of the date of the award, the completion date for the project was November 1, 1996. (AF 63, 217; Tr. 7-8, p. 209.)

17. On April 29, 1996, the FS received a letter from Eldorado Investments, Inc., which had also submitted a proposal on the project. The letter provided financial figures on the lease, which in summary contended that the \$10.44, being charged by the Appellant for rent, was below what Eldorado contended were project costs of \$13.41 per foot. Moreover, Eldorado said that \$17.88 a square foot was the sum needed to return a reasonable profit to an investor. Eldorado used building and land costs of \$3,213,000. (G 94.) The CO responded on May 7, noting that Mr. Quayle had verified and remained the low offeror (G 95).

18. On May 6, 1996, the Appellant and the FS held a pre-work meeting. At that time, the plan was for the lessor to construct and provide both the fire center and supervisor's office at the same time. Mr. Quayle attended with Mr. Duane Koyle and Mr. Sherwin Kirby, who were each listed on the meeting notes by the FS as partners. At the meeting, Mr. Quayle said that he expected actual construction of the supervisor's building to take 150 to 180 days. He said that construction could begin within 10 to 12 weeks after the agency provided a final floor plan. (AF 296-99; App 68, para. 18.)

19. Thereafter, the FS continued to make changes to proposed floor plans at meetings during May and June (AF 236, 291-92, 294-95). At a June 6, 1996 meeting, Mr. Quayle discussed his plan to change the location of the supervisor's building to an alternate site owned by the City of Richfield. At the time, Appellant said he would submit a formal request to change the location of the building, if the City approved Omni's plan to construct there. (AF 291-92.) Mr. Quayle continued to be accompanied at this meeting and at a number of other meetings by Mr. Koyle, a participant in Omni (AF 291). According to Government, no formal request to change the location was ever submitted; however, the record is clear that at some point in the summer of 1996, the parties operated on the basis that the supervisor's building was to be sited on the new city site. For example, in a message from Mr. Dennis Allan, the CO's Representative (COR) to the CO, dated June 20, 1996, he referenced that the planned location for the building was on a piece of city property. (AF 287, 290.)

20. Mr. Quayle first delivered preliminary drawings on or about July 18, 1996 to Mr. Moffett (AF 287; Tr. 7-11, p. 175). The supervisor's building was to be a commercial building, based

essentially on a residential style design. The primary differences between the office construction and that of a residential building were the larger size, the elevator and handicapped access. According to Mr. Quayle, the building would be comparable to 13 average size houses for heating. (Tr. 7-11, p. 7.)

Mr. Moffett reviewed these drawings and provided comments. He noted several deficiencies on the drawings and stated that the drawings were not close to being finished. At the time they were submitted, however, Mr. Quayle told Mr. Moffett that they were not completed drawings. (AF 286-89.)

21. In September 1996, the COR, Mr. Allan, told Appellant that he understood that the Bureau of Land Management (BLM) was looking for space and believed that co-locating BLM with the FS would serve both agencies. He encouraged Appellant to submit a proposal. According to Mr. Quayle, the BLM matter delayed the project for approximately 4 months and Mr. Allan and the FS were aware of that. (App 68, para. 33, 38-9, 41.) At the time of the termination, the CO knew that the Appellant considered itself delayed by the BLM matter. (App 135, para. 123.)

22. During the late fall of 1996, Mr. Quayle petitioned the City to purchase the City building site located at 1125 N. Main. After a proposed purchase price was agreed upon, the terms of the proposed sale to Mr. Quayle were voted upon at the City Council meeting of November 12, 1996. The sale was for 2.5 acres. A motion was made and carried, which approved the sale of the property to Omni Development Corporation, with a payment structure of half down, the balance being financed for up to 6 months at 8% interest. The City Council approval carried a due date of June 1, 1997, and called for proof that Mr. Quayle had secured a construction loan. (App 68, para. 40; G 177, para 3-5.)

23. At that time, Omni had made no down payment nor any other payment toward purchase (Tr. 7-11, p. 295-96). As a matter of practice, when the City sells real estate, it does not enter into a written real estate sales contract with a buyer prior to closing; instead, the City's real estate transactions are relatively informal (App 96, para. 3). Mr. Quayle described the process as having Omni tender 50% of the purchase price in cash at closing, at which time Omni would obtain title to the property (G 175, p. 8-9). In addition, at closing, Omni would tender the other 50% in the form of a promissory note from Omni, secured by a purchase money trust deed encumbering the property (App 68, para. 40; App 96, para. 18; G 175, p. 8-9).

24. While the City Council approved the sale in November; earlier, in late October 1996, the city had granted Omni permission to enter the property and start preparing the site for construction of an office building (App 96, para.17). Omni conducted staking, leveling and some compaction. It completed most of the grading for the site in November 1996. According to Mr. Ronald Foster, a site work contractor who performed work at the site for Omni (and who also held a minor ownership interest), by the end of November 1996, the site work was close to completion and Omni had only a day or two of work remaining before it could start pouring the foundation for the building. (Tr. 7-8, p. 187.) At the time of the termination, the CO knew that Omni had conducted excavation and grading at the site and further that it had placed a trailer at the construction site owned by the City. The CO stated, " I knew that he had been over there, that they had put a trailer on the site, and that they had been scratching around in the dirt, moving some dirt or doing something, but I didn't . . . " (App 135, pp. 192-94.)

25. Omni submitted its proposal on the BLM solicitation on October 21, 1996. Until that was resolved, it could not move forward with financing. At the time it was dealing with Bank One on financing. According to Mr. Kirby, who was preparing the design for the Appellant, the process of incorporating BLM into the project involved changing a number of drawings, estimating 50% of the pages. (Tr. 7-8, pp. 101-02, 107, 125-128.) During that time, Omni was in contact with the FS, which knew the BLM matter was impacting finalizing building plans, obtaining a permit and securing financing. Mr. Allan specifically acknowledged that he knew Omni's involvement in the FS project would be delayed as a consequence of the BLM matter. (Tr. 7-1, pp. 131-33, 135, 138.) As of January 1997, no attempt had been made by the FS to set a new completion date and the initial complete date of November 1996, had long expired.

26. While matters remained in limbo as to BLM's decision on co-locating, the FS asked Omni in early January 1997 if Omni would proceed with construction of the fire center before proceeding with the supervisor's building, as the FS needed the fire center by June 1, 1997 (Tr. 7-1, p. 139; App 63, pp. 126-27). The FS indicated that the occupancy date of the office building, although important, was not as critical and the office building could wait on BLM's decision as to co-locating (Tr. 7-1, pp. 139-40, 145; App 68, paras. 33-34, 38-39, 41-42).

27. By letter dated January 15, 1997, Omni was informed by BLM that BLM was no longer interested in leasing space with Omni. In Mr. Allan's view, the impact of the BLM matter came to an end on that date. (Tr. 7-1, p. 138.)

28. During December 1996, Omni began construction at the fire center (Tr. 7-1, p. 139; App 68, p. 48). The parties had not yet executed an SF-2 (the actual lease agreement) on either the fire center or supervisor's building. According to Mr. Allan, Omni was working under the original award. Mr. Allan expressed some internal concerns to the CO as to the fact that there was not an "official contract." Additionally, no delivery date was established. Because Mr. Quayle had said to the FS that it could occupy the space by May 1, 1997, the FS assumed that May 1, was the delivery date. (AF 269; Tr. 7-1, pp. 139-42).

29. Although the City Council expected Omni to obtain its construction loan sometime in early January 1997, the City Council did not establish a mandatory date by which the sale of the property had to be closed. In fact, Ms. Linda Ogden, the title escrow officer for D Land Title, said that she thought as late as July 1997, that it was still possible for the land to close. The expectation of the City to close, even in July, was confirmed by Mr. Farnsworth, the City Manager (G 175, paras. 8, 17; App 96, para. 22.)

30. In January 1997, Ms. Ogden prepared documents to close the property (G 175, para. 8; App 96, paras. 20-23). In addition, in February 1997, the City Manager made revisions in draft closing documents. He described this action as one he would not have logically taken unless the City intended to go forward at the time. (App 96, paras. 22-23.)

31. In February 1997, Omni contacted a Utah appraisal firm, Rigby Associates (Rigby), whose principal was Larry Rigby. Omni was dealing with Federal National to secure a mortgage on the supervisor's building and needed an appraisal for that purpose. The supervisor's building was to be at the City location. Rigby prepared an appraisal of the proposed property and structure, which he sent to Federal National on February 6, 1997. Omni provided input to Rigby as to proposed costs to construct. (Tr. 7-7, p. 6-7, 77; G 195.) Chad Rigby was the lead appraiser. His father, Larry Rigby, inspected the property, reviewed and signed the report. At the time of the appraisal, Larry Rigby had the Member Appraisal Institute (MAI) designation, Chad Rigby did not. Chad Rigby subsequently secured the designation in 2002, and had it at the time he testified at the hearing on the appeal. (Tr. 7-7, pp. 77-8, Tr. 7-10, p. 112.)

32. The 1997 appraisal considered three approaches for valuing the property as of December 31, 1997, the proposed occupancy date. Those were the cost, market and income approaches. The market approach was considered the least trustworthy, because of a lack of comparable properties in the Richfield area. The cost approach was considered better than the market approach, but less reliable or accurate than the income approach. The cost approach relates market value to cost of construction. The principle of "substitution" is basic to the approach. The cost approach is based on the premise that no prudent investor would pay more for a property than the amount it would cost to buy a site and construct improvements that have equal utility and desirability. (G 195.)

33. Rigby identified the income approach as the best means of measuring value. The income approach is based upon the premise that market value is the present worth of future anticipated benefits to be derived from owning the property. The anticipated benefits of owning the property are primarily in the form of a rental income stream plus the reversion of capital upon a sale. The potential for appreciation, depreciation and other tax related items are also considerations of a prudent investor. (G 195.)

34. The valuation process used in the income approach considers the gross rent potential of the property, less deductions for vacancy, and expenses. That gives one a net operating income (NOI). The NOI is then capitalized or discounted at a rate that would be attractive to prudent investors within the marketplace. There are two basic capitalization techniques that can be utilized in the income approach; (1) direct capitalization and (2) yield capitalization. Direct capitalization converts and estimates a single year's income expectancy into an indication of value in one direct step. Yield capitalization uses a discounting procedure to convert future benefits to present value, on the premise of a required level of profit or rate of return on invested capital. (G 195.)

35. Because the structure was not yet built, Rigby estimated expenses. The amount of revenue from the FS portion of the lease was a known number, while market value rent had to be estimated (G 195). Because the building was to contain market space (approximately 16%) that was not pre-leased, Rigby opined that a direct capitalization method for the income approach was the most accurate indicator of value. The appraisal stated that a significant amount of subjectivity would be necessary to value the property by way of the discounted cash flow analysis. The Rigby appraisal pointed out that the FS lease was a 10-year lease and that subjectivity was necessary to determine whether the government would exercise the options available or seek other space. Rigby stated that future rental rates and expenses would also require subjectivity, therefore, the direct capitalization

method of the income approach was deemed the most accurate measure for valuing the property. (G 195.) It is noteworthy that when Rigby calculated the reversionary value as of 2007 in its 2002 appraisal (to be addressed later), it identified the discounted cash flow or yield approach as a better alternative, than the direct capitalization approach, used for determining market value for December 1997 (G 196).

36. To run the calculation using the direct capitalization income approach, Rigby took the monthly gross income from the FS rental (with no vacancy), added to that the monthly rental for the additional space at an estimated market rate, and then took that total and deducted \$18,706, identified as 8%, from the total. It is not clear what the 8% was applied to. Rigby then arrived at an effective annual gross rental income of \$355,415. Rigby then deducted from that the gross rental figure and various estimated expenses. Among those expenses was management expenses of \$14,217 (which was derived by taking 4% of gross anticipated rents). Rigby stated that the 4% was less than the high outlined by brokers in the area; however, he explained that the lower figure took into account that much of the space would be leased by the government. (G 195.) One expense that was not listed in the Rigby calculation for this appraisal was an expense for debt service. When asked about this during testimony, Larry Rigby explained that the appraisal process stops before the redaction of debt. He explained that they just appraise the land, the building and the associated project associated with the lease amounts. He said debt is another thing that is a variable that he does not get involved in unless it is a consultation problem or evaluation problem for an interest other than fair market value. (Tr. 7-7, p. 23.) Chad Rigby described it as more of an evaluation problem. Debt service, although an expense, is not typically included in an appraisal of this nature nor is it used to reduce cash flow in the capitalization calculations (Tr. 7-7, p. 23). The Rigbys then applied a capitalization rate of 9.80% to the NOI, which was the difference between the estimated income and the expenses. The 9.80% capitalization rate was derived by taking the sale prices of a number of buildings (with government leases) and comparing the sale price to the NOI. That yielded the capitalization rate. Using the above method, Rigby valued the building with the 10-year lease in place, at \$2,805,000. (G 195.) It is important to understand that the \$2,805,000 was the value using the income approach, with the Government leases in place for the 10-year period, and did not take into account the debt service. It is also important to understand that the above figure reflects the total value of two components as of December 31, 1997. One was the 10-year guaranteed income stream and the other the reversionary value at the end of the lease. (Tr. 7-7, p. 24.)

37. In the correlation and final estimate of value for the 1997 appraisal, Rigby made the following additional comments. Rigby said in its costs calculation, the appraisal used both the industry index as well as a construction cost breakdown provided to them by Omni. They said that the correlation of the cost approach relied heavily on the construction cost breakdown provided to them by Omni. That cost breakdown estimated construction at \$2.7 million. Notwithstanding the cost approach calculation, because the majority of the building was pre-leased, it was Rigby's opinion that the income approach was the most accurate indicator of value, and thereby it was given the most weight in the analysis. (G 195.)

38. In a February 6, 1997 daily diary, primarily dealing with the ongoing work on the fire center, the FS reported Aaron Quayle of Omni was asked about the "holdup on the office building," and

responded to the FS that Omni had to have a commercial appraisal completed before it could finalize the funding. He stated that funding is expected "to be in place by next week, so that weather permitting work will start their (sic) soon." (AF 276; Tr. 7-1, p. 74.) Thereafter, in a diary of February 10, 1997, the FS reports that Bob Quayle was at the site taking pictures and that Aaron Quayle indicated they were needed to help get the final financial hurdle crossed so that construction can start soon on the office building. On this same day, the FS asked Aaron Quayle when he thought the FS would get an updated copy of the office building plans, as the FS wanted to get the information out to some installers of the voice data lines and determine some square footage allocations. (AF 273.)

39. During February 1997, the FS expressed internal concerns over Omni's delays to the start of the supervisor's building, particularly whether they might occupy the fire center and then have the rest of the space fall through (AF 261, 264-265, 269, 271). On March 3, Mr. Allan's notes show that he had been told by Omni that Mr. Quayle had "this" 99% finalized and the final drawings should be to the FS by March 24, 1997 (AF 265).

40. By letter dated March 3, 1997, the CO wrote Mr. Quayle:

Over the last two weeks, I have received a couple of calls from your bank regarding the financing on the Richfield office [that is, the main office portion of the lease]. Since I awarded that lease to you on April 23, 1996 and not much progress has been made on the larger structure covered by this lease, I'm establishing some time frames [sic] for information to be submitted that will assure us that this building will be built in the near future.

By March 14, 1997, please provide me with firm, financing papers from your bank. By March 24, 1997, please provide me with a set of final drawings. I need to do some space calculations and can not do that until I have a set of drawings reflecting all the changes. By March 24, 1997 I also need a progress schedule for the actual construction of the larger complex.

(AF 215.)

41. On March 13, 1997, Bank One, which Omni had been dealing with as to the loan, wrote to Omni advising it that it desired to structure a loan on behalf of Omni (AF 213-14). However, by the end of that month the application with Bank One began to stall and Omni began discussions with another lender, Equitable Life and Casualty (Equitable). (App 68, paras. 58-72.)

42. Omni's initial discussions with Equitable began in March 1997. Omni began those discussions with Equitable because Omni had concerns as to Bank One, and additionally, Equitable appeared to have a better rate. Mr. John Pitcher, the loan officer for Equitable, told Omni that Equitable preferred financing construction of government-leased buildings and could process the application from start to finish in 30 days. Mr. Pitcher told Mr. Quayle that during his entire tenure at Equitable, the loan committee at Equitable had never failed to approve a proposed loan involving a government-leased building that Mr. Pitcher had recommended for approval. Making a loan on a

structure where the government was the anticipated lessee was Equitable's top priority and Equitable would have tried, every way, to make it work. Regarding the loan, Mr. Pitcher was to be the gate keeper and he would draft a report to the loan committee, which would recommend the loan, if a decision to recommend was made. Even where he expressed concerns dealing with post approval, Mr. Pitcher continued to state that because it was a government lease, Equitable would try to avoid losing it, if possible. (Tr. 7-7, pp. 194, 199, 233-35, 276-80, 286, 290, 300; App 82, paras. 5-6.)

43. On March 24, 1997, the FS conducted a "final inspection" of the fire center. A punch list was generated. As a result, the parties discussed the schedule for occupancy. It was proposed that occupancy take place on April 14, 1997. (G 10.)

44. On March 27, 1997, the Appellant met with the CO and they discussed the matter of financing and Omni's intended use of Equitable as the lender. Omni told the CO that an application could be processed within 30 days. (App 68, para. 61.) On March 28, 1997, the CO noted in a memorandum (not provided to Omni) that a discussion was held among government officials about a termination for default and the FS decided at that time to give Omni 30 more days. The FS noted that 30 days would allow Omni to start construction and finish within 8 months. That would allow the Government to occupy by January 1, 1998. (AF 261.) At this time, the FS did not have a schedule from Mr. Quayle either as to the planned completion date or how long the actual work would take to complete. It is noted, however, that at the time of the award, April 23, 1996, the completion of both the fire center and the supervisor's buildings were expected to be November 1, 1996. (AF 63.) That is approximately 6 months. The time frame is relevant, in that in defense of the termination, the FS has asserted that Appellant would have needed 8 to 10 months to complete and the award contemplated a shorter time frame. In noting the above inconsistency, the Board recognizes that at the time of the award, the FS may very well not have contemplated holding Appellant to a November 1, 1996 date and thereby could have contemplated giving Appellant more time to complete. This inconsistency standing alone, is simply one factor to be considered in assessing how much time it would have taken to construct.

45. In a letter dated March 31, 1997, to other government agencies which were to occupy the supervisor's building, the CO stated that since awarding the lease, the lessor ran into problems with the original site, zoning on the new site, and finalizing financing. Further, the CO stated:

The lessor has requested time to pursue an alternative source of financing and I have allowed him until April 30th to get his financing settled. At that point in time, the agencies will have to decide their next step. The reason I have been so lenient with the lessor, is his price per square foot is low and I don't think we will see that again if we have to start the process over.

(AF 207.)

46. The CO informed Omni by letter dated March 31, 1997:

I relayed to the Fishlake National Forest your most recent proposal to pursue a parallel line of financing through an insurance company. I explained that within 30 days you would have either the financing and could start construction or you would know for certain that financing was not available. It is agreeable to allow you this 30 days; however, I will need a letter of intention from your insurance company by this Friday, April 4th. In this letter I would like to see their proposal outlined with firm dates for their final decision.

If neither line of financing can be confirmed in 30 days (by April 30th), the government agencies will then have to decide whether or not we want to continue with this lease for the larger structure or whether we will start over in seeking leased space.

(AF 206.)

47. On April 7, 1997, Mr. Pitcher wrote to the CO and advised her that Equitable had reviewed the information supplied by Omni, as well as had its appraiser review the earlier summary appraisal report. Mr. Pitcher set forth Equitable and his past experiencing in funding this type of leased building. He stated this type of funding, referring to Government-leased buildings, was Equitable's number one preferred style of mortgage lending. He then stated, "Though we don't have an appraisal or loan application to permit us to really get into this deal, we have every expectation of funding a combination construction permanent loan for the borrower subject to the finalized lease which we understand should be completed by the 25th of this month." It appears from the Equitable letter that one of the items Equitable needed was the lease, which at that point had not yet been executed or prepared. (AF 205; App 82, para.11.)

48. At the time of the Pitcher letter, Equitable had procured a contract review of the 1997 Rigby appraisal by Nazih Mamood, an appraiser, whose review, according to Mr. Pitcher, was the only one that Equitable was accepting. In his April 2, 1997 report, Mr. Mamood identified what he characterized as a number of weaknesses in the Rigby appraisal and its conclusions. (Tr. 7-7, p. 200.) At the hearing, the government emphasized that Mr. Mamood's report had concluded that the net operating income (NOI) generated by the government lease and the proposed market space (\$274,833) was not sufficient to cover debt service at typical financing terms (\$294,500). Mr. Mamood concluded that "[o]verall, this was a weak summary report, the value conclusion is high. The report was not convincing." (G 56.)

49. Mr. Mamood was not called to testify. There is no evidence that any alternative appraisal or recommendation was made to Equitable as a result of Mr. Mamood's review. (Tr. 7-7, pp. 244-45.) However, Mr. Pitcher (the individual for whom Mr. Mamood prepared the review) recommended that the loan be approved, well after receiving the Mamood analysis in April. In addition, Equitable's loan committee approved the loan. The approval of a loan did not end the process or assure the finality of the loan. Even after initial approval, a number of contingencies remained (generally applicable to all Equitable loans), which had to be satisfied. In his affidavit of July 15, 1999, Mr. Pitcher addressed the process after the loan approval. He stated, "based on my experience

and prior practice, depending on the length of a borrower's review of the loan papers and its ability to produce the requisite Lender's Standby Fee, a loan typically closes around two weeks after the borrower returns the signed loan commitment and associated standby fee. In Omni's case, it had in its possession a copy of most of the required loan documents by April 18, 1997. Omni's Lender's Standby Fee was \$34,600. Based on my prior experience and practice with loan closings of this type, it is my opinion that, assuming Omni quickly returned the commitment and could provide the requisite Lenders Standby Fee, Omni's loan would likely have closed sometime between July 9, 1997 and July 14, 1997." (App 82, para. 20.)

50. On or about April 14, 1997, the Government prepared a formal lease (SF-2) for both the fire center and supervisor's offices. The contract (lease agreement) incorporated by reference the solicitation terms and provisions, including specified General Services Administration (GSA) forms which were part of the solicitation. The lease specified a 10-year firm term, subject to renewal and termination during the renewal period and stated that the "tentative occupancy date" for the main office is December 31, 1997. (AF 49-50.)

51. As of the April 25 date of the signing of the lease, Omni did not own the land on which the main office building was to be constructed, the building plans were not yet approved, and Omni lacked a conditional commitment for financing. The FS was aware of these matters at that time.

52. The FS explains that the signing of the lease was triggered when Bank One contacted the FS and requested a signed lease in order to review the loan application for the office building project. This had to do with the fire center and had nothing to do with the supervisor's building. (AF 258.) On or about April 18, 1997, Ms. Deborah Hinricks took over as Leasing Contracting Officer for then CO, Ms. Lippire (AF 14). On April 18, Ms. Lippire requested Ms. Hinricks to prepare and execute a formal lease with Omni (AF 258). Ms. Lippire informed Bonnie Gilbert, another FS contracting official, of changes to SF-2, since the conditional award letter of April 23, 1996. On the new lease, Ms. Gilbert set out as the address for the main building as the City site in Richfield, set out the occupancy date as "tentatively" 12/31/97, listed the size as 25,661 square feet and showed an annual rental rate for the main building of \$267,900.84. (AF 49.) According to Ms. Hinricks, she had discretion to either create a contract through an award letter or an SF-2. She opted for the SF-2. (App 135, p. 21.)

53. As of March 31, 1997, the CO reported to other USDA agencies that lessor had delivered the fire center and it was to be occupied April 14 (AF 207). A punch list inspection had been conducted on March 24, 1997 (AF 209). Thereafter, additional inspections were conducted with the FS indicating on April 28 that it would be soon taking occupancy. According to Omni, by April 18, 1997, more than 6 weeks before the deadline for completion of the fire center (that had been requested by Mr. Allan), it had substantially completed the fire center portion of the work. The FS expressed concerns that finishing the punch list was slow. (AF 253, 260; Tr. 7-1, pp. 81, 92, 99, 148-49; Tr. 7-2, pp. 45-46; App 63, p. 55.)

54. The FS, at the hearing, put on considerable testimony from Mr. Allan and Mr. Moffett, who described the fire center construction as poor in both management and result, specifically charging as

to the latter that the building was completed late. The two also referenced problems on the management side (such as janitorial issues). As to the punch list, the CO, Ms. Lippire, described the punch list items as individually minor. She did consider the punch list significant because of what she said was the number of items (Tr. 7-2, pp. 46-7.) The punch list, prepared on March 25, 1997, showed 30 items, a number of which did not involve the physical construction, but instead involved submissions that either were or would have to be provided to the FS. Two items, surge protectors and light ballasts were disputed specification items. (AF 209-12.) In daily diary of April 28, 1997, the FS shows that 12 of the original punch list items were completed (AF 253). During his testimony, Mr. Quayle addressed the March 27 punch list (AF 209-12). He first said the building had been constructed to specifications and then said the punch list items fell into several categories. He pointed out that some items, such as the omitted water fountain and the spotlight on the flagpole, were items that Omni had been told would not be needed. They were therefore taken out of the plans. When the inspection was made, the gentlemen doing it said that if it had been in the specifications, then it must be provided. Another item was asphalt and landscaping, which had to wait for certain weather conditions. (Tr. 7-8, pp. 265-73.) As to completion on time, the building was described as substantially complete by April 18. There is no dispute that move-in took place on or about May 1, and the remaining items did not prevent occupancy. Finally, despite the FS claim that the fire center was completed late, Mr. Allan testified that at a meeting in November the FS discussed the need to have the building completed before June 1. There was no document setting a May 1 date. (Tr. 7-1, p. 139.)

55. In submitting its loan application to Equitable, Omni anticipated \$1.73 million as the estimated cost for construction. That figure, according to Mr. Quayle, was what Omni knew it needed to be safe in construction costs. According to Mr. Quayle, he could do the construction for that or less. (Tr. 7-11, p. 18-19.) On or about April 21, 1997, Omni provided Mr. Pitcher with a check, as an application fee. Omni had taken in its application to Mr. Pitcher no more than a week or so before that. (App 48; Tr. 7-11, pp. 27-8.)

56. The loan being sought by Omni from Equitable was both construction and permanent (Tr. 7-11, p. 43). Mr. Pitcher told Mr. Quayle that Equitable would not put up over 50% of the land costs. Mr. Quayle and Mr. Pitcher talked about what was needed to clear the title. The City was going to carry the other half of the land costs. Mr. Pitcher wanted that half subordinated to Equitable's loan and Mr. Quayle confirmed to him that he had such an arrangement with the City. (Tr. 7-11, p. 44.)

57. Omni was going to provide management of the building through sweat equity. Sweat equity is providing services through labor as opposed to paying cash. According to Mr. Quayle, it did not matter if Omni recovered the management fees through the rent or through a separate management fee on top of rent. The building was large enough so that Mr. Quayle was going to manage it and live in Richfield. Management tasks included seeing that the building was operating properly and tenant needs were being met, such as janitorial and maintenance duties and coordinating any additional improvements. (Tr. 7-11, pp. 14-15.)

58. On April 25, 1997, the parties met to sign the SF-2. By that point, Ms. Hinricks was the CO. The FS notes say that the Appellant expected to close the construction loan on May 2, 1997, based

on receiving the signed SF-2, and that Appellant would submit a construction schedule by May 5. The occupancy date of the fire center changed to May 1. It also stated that he (Appellant) expects to complete construction within 6 to 8 months. (AF 255-56.) The Appellant had financed the building of the fire center on its own. The construction costs for that structure were approximately \$165,000. (Tr. 7-8, p. 242.) During the construction of the fire center, Mr. Quayle was only occasionally at the fire center. He explained that his absence was due to the need to get the supervisor's building underway. His son, Aaron Quayle, had moved to Richfield in approximately September 1996, and Aaron Quayle essentially ran the fire center job, as well as performed construction work on the fire center. (Tr. 7-8, p. 263.)

59. The SF-2 lease, signed by the parties on April 25, 1997, differed from the award letter of 1996 in a number of material respects. Most significant, for purposes of this appeal, the lease described completion as a "tentative completion date of December 31, 1997." The original completion date had been November 1, 1996. (AF 49-50, 63, 217, 255.)

60. Notes of the April 25 meeting were taken by Bonnie Gilbert. Mr. Quayle and Ms. Hinricks attended. A good part of the meeting dealt with issues relating to the fire center. However, some discussion focused on the supervisor's office. According to Ms. Gilbert, Mr. Quayle reported that he expected to close on the construction loan by May 2, based on receiving the signed SF-2 on April 25. He expected to complete construction within 6 to 8 months. The FS asked him to submit a complete set of plans to Mr. Moffett before starting construction and Mr. Quayle agreed to submit them within one week of finalizing the plan. He also said he would submit a construction schedule by May 5, based on a monthly timetable. The notes also reflected a telephone conference with Mr. Allan. In that conversation, the parties agreed to a May 1 occupancy date for the fire center, which; however, was pending approval of the surge protectors for the dispatch console. The parties discussed establishing a firm term date for both leases. The FS indicated that it anticipated establishing the firm lease date upon occupancy of the main office, since the mortgage would probably require a full 10-years to pay off. (AF 255-56.)

61. Mr. Quayle testified that to the best of his recollection, he had a conversation with Ms. Hinricks or Ms. Lippire regarding setting a realistic date for occupancy. In the discussion, they came up with December 31, 1997. He closed saying, "I don't know on what basis they put down the date, whether it was a conversation I had with Deb Hinricks or with Jo Lippire." (Tr. 7-8, p. 276.)

62. Other than the December 31, 1997 date, the lease did not set firm durations or interim dates that Appellant had to meet. Moreover, the lease contained no new language as to the construction schedule or financing. In later correspondence, specifically the CO cure letter of June 6, the CO stated that Omni had not submitted a firm commitment for financing as required by the lease and as requested in the FS meeting of April 25 and May 9. (AF 38-39.) Additionally, at the meeting on April 25, Mr. Quayle said that Omni expected to "close his construction loan on May 2, 1997, based on receiving a signed SF-2 and that he would submit a construction schedule by May 5, based on a monthly timetable." (AF 255.) We have no reason to doubt that Mr. Quayle made those representations. However, there is nothing in writing which reasonably incorporates those dates into the agreement or sets out what would happen if Omni did not meet those dates. What is not disputed

is that as of April 25, 1997, the date the FS and Appellant signed the lease, the following circumstances were in effect. Omni did not have title to the land on which main office building was to be constructed, the building plans had not yet been approved by the City and Omni did not have a firm commitment for financing. Omni, however, had until the "tentative date of December 31, 1997" to deliver the building.

63. On May 9, 1997, the FS and Omni again met. The FS inquired as to the status of the construction schedule and financing. At this meeting, Mr. Quayle presented three copies of the final plans for the main office building. Ms. Hinricks asked for the construction schedule, which Mr. Quayle stated was not yet ready, as he had not closed on the loan. Mr. Quayle indicated that he expected to be able to acquire building permits based on changes that had been incorporated into the plan. As to the schedule, Ms. Hinricks wanted it within 2 days. Mr. Quayle said he did not want to submit a construction schedule until the financing was complete. Ms. Hinricks asked that he go ahead with it so that when the financing was in place, he could immediately proceed with the construction of the building. She also asked that he proceed with acquiring the building permits, so that there would be no further delay in beginning construction. (App 112.)

64. At the meeting, Ms. Hinricks discussed the option of assessing actual damages based on increased costs that the FS would have to negotiate with its current lessor. She also noted that the FS had the option to terminate for default if the building did not start soon. She asked if Mr. Quayle believed he could get financing. She required him to submit a construction schedule by May 12, regardless of financing status. He agreed to do this. She told him that if he missed one day on the construction schedule she might begin to assess actual damages. She asked him not to lead the FS on that he will complete the project, and asked him if he wanted to proceed. Ms. Gilbert, who authored the notes, then states that in accordance with Para 3.10, page 8 of the contract boilerplate, Ms. Hinricks was requiring a progress report every 14 days. She was also requiring the construction schedule in accordance with Paragraph 3.9. (This provision had been tied to the original award date). Ms. Hinricks re-emphasized the necessity to get the permit process going based on the final plans. Mr. Quayle said that he wanted to wait until the FS engineering staff had reviewed them. He pointed out that once the City issues a permit, the plan is firm and cannot be changed. (AF 200-03.)

65. The plans provided at the May 9 meeting were reviewed by Mr. Moffett, who requested some changes. He described the drawings as near final, but he still had questions. Thereafter, at a meeting on May 19, Mr. Moffett noted that he did not expect to see plans again as long as the City was satisfied. Changes would be redlined on the drawings. (AF 246-47; Tr. 7-2, p. 91-92, 115-16; App 91, para. 8; App 68, para. 82; App 93 at 14.)

66. According to Mr. Quayle, he faxed a construction schedule to the FS on May 12, 1997. He said that he had earlier given the schedule to Mr. Allan. (AF 198; Tr. 7-11, p. 174; Tr. 7-8, pp. 316-24.) In referring to the earlier schedule, it was identified as one of the schedules in App 131. One of the schedules showed a March 31, 1997 start and September 1, 1997 finish, while the other showed an October 28, 1996 start and a May 1, 1997 finish. The first was 5 months duration and the second, which had work through the winter and over Christmas, showed 6 months duration. (App 131.) The schedule provided to Mr. Allan on May 12 (AF 198) was set out as follows:

SCHEDULE AS PER 3.9

(1)	PRELIMINARY PLANS AND SPEC.	COMPLETED
(2)	WORKING DRAWINGS	MAY 9, 1997
(3)	ISSUANCE OF BUILDING PERMIT	RESUBMISSION WITHIN 5 DAYS OF REVIEW AND RESOLUTION OF PLANS BY F.S. ENGINEER
(4)	COMPLETED CONSTRUCTION DRAWINGS	WITHIN 10 DAYS OF REVIEW AND RESOLUTION OF PLANS BY F.S. ENGINEER
(5)	START OF CONSTRUCTION	
(6)	PRINCIPAL CATEGORIES OF WORK	
(A)	SITework (15 DAYS)	COMPLETION LESS 180 DAYS
(B)	FOUNDATIONS (15 DAYS)	COMPLETION LESS 165 DAYS
(C)	FRAMING/TECH (60 DAYS)	COMPLETION LESS 150 DAYS
(D)	DRYWALL (30 DAYS)	COMPLETION LESS 90 DAYS
(E)	PAINT (30 DAYS)	COMPLETION LESS 60 DAYS
(F)	CARPET (30 DAYS)	COMPLETION LESS 30 DAYS
(7)	PHASED COMPLETION FIRE DISPATCH CENTER ONLY	COMPLETION MAY 1, 1997
(8)	FINAL CONST COMPLETED	DECEMBER 31, 1997

ALL COMPLETION DATES ARE SUBJECT TO ACCELERATION BASED ON RECORDING OF CONSTRUCTION LOAN.

67. Appellant contends that the CO understood that the 180 days for completion was realistic and that construction could be completed in as little as 150 days. In support, Appellant points to the CO's notes from a meeting on May 8, 1996, which reflect that Mr. Quayle informed the FS that construction was expected to take 150 to 180 days. (AF 296-97; App 68, para.18). Mr. Quayle stated that the May 12, 1997 schedule he provided to the FS included 30 days for unforeseen delays and was based on the assumption that Omni would not have to use any acceleration techniques. Nothing on the May 12 schedule noted a specific 30-day cushion, but the schedule did state that all dates were subject to acceleration. (AF 198; App 68, para. 81). As of the date of the termination the CO had been told by Mr. Steadman in his letter of June 18, 1997, that Mr. Quayle had 30 days of cushion in his schedule and had included it based on years of experience. The Steadman letter will be addressed in more detail later, but it responds in part to her request to tell her how Mr. Quayle would be able to accelerate and finish the job. (AF 33.)

68. On May 19 the parties held another meeting, at which the FS reports that Mr. Quayle stated he was “unsure of where he is at with financing.” The meeting notes also indicate that the CO had been in contact with Mr. Pitcher and reflect that Mr. Pitcher told the CO that Mr. Quayle needed to submit his appraisal and it would be 2 weeks after that submission to get the loan approved. Mr. Quayle informed the FS at the meeting that Mr. Pitcher had the appraisal. Mr. Quayle continued that Mr. Pitcher had told him he needed some more information and needed to deal directly with the appraiser, without Mr. Quayle as an intermediary. Mr. Quayle reported to the FS that was what he had been doing ever since. (AF 248.) According to Ms. Hinricks, it was her understanding that “Quayle [Omni] would be approved or denied a loan two weeks after Pitcher received the appraisal.” (App 135 p. 138.)

69. Also on May 19, the FS personnel met internally. The notes of the meeting confirmed that Mr. Pitcher had said that the financing would be 2 weeks after the appraisal was complete and the appraisal was not yet complete. The notes then went on to discuss the existing lease and fact that the current lessor, Petersen, wanted 1-year’s rent. Also there was some discussion as to sole sourcing for 5 years, based on a default and that the FS would contact other agencies to see if they wished to proceed, because there had been indications that some may want to pull out. (G 31.)

70. Additionally, on May 20, 1997, the co-locating USDA agencies were consulted by the FS about the possible termination of the lease. The discussion of possible termination was addressed in messages of May 21 and 22, between Mr. Allan and Ms. Hinricks. The messages reflect that the other Agriculture agencies were in agreement with what was characterized as the “decision to terminate.” (G 14, 32; AF 242.)

71. On May 27, Ms. Gilbert discussed Omni’s loan application with Mr. Pitcher. She said that Mr. Pitcher indicated that Omni had “still not provided information necessary to go forward with loan approval.” Mr. Pitcher, however, continued and stated that after information is received, “2 weeks before loan could be approved.” (AF 240.)

72. On May 29, 1997, the FS notified the Appellant by telephone that the FS was intending to terminate the portion of the lease dealing with the supervisor’s building for default because of failure to obtain financing (AF 240). Mr. Quayle again requested that the CO discuss the pending loan with Mr. Pitcher. The CO refused to meet but did agree to have a conference call, which was scheduled for 11:00 a.m. on May 30. The CO never received a call that day. (AF 240.) The CO’s notes of the conversation with Mr. Quayle show that the parties spoke late in the day on May 29. It reflects that “waited for changes during the summer” and that “views the government changes, as preventing him from performance - 4 weeks out on the financing.” It then provided, “via conference call at 11:00 conference call to hear what Mr. Pitcher has regarding financing. I said I will still tell him, we will be terminating the contract. Mr. Quayle wants to bring his attorney to discuss lease termination as he feels 3 weeks is not unreasonable.” The message then notes that Mr. Quayle called at 10:50 a.m. on May 30, which apparently was picked up by voice mail. The message was that Mr. Pitcher was not in his office and would call later to have a conference call. At 4:00 p.m., Mr. Quayle had not called yet. (G 20.)

73. Omni then provided the CO with a letter dated May 30, 1997, which stated:

It is my intention to comply with the lease by providing a building by December 31, 1997 and to follow the building schedule as submitted on May 12, 1997 as per your request. In order to do so the building should be started near the first of July 1997.

John Pitcher of Equitable Life and Casualty has given me a date prior to that time for his recording of his loan on the property, thus allowing us to start construction by that date or sooner.

(AF 187.)

74. On June 2, after an number of internal communications between various FS officials, the FS came to a decision to terminate the supervisor's building portion of the lease. (AF 242; App 18). These communications were contained on a Message Display for Deborah Hinricks. Of note is a message from Rob Mrowka, where he expressed the need for a clean break with Quayle and exploration of future options, including co-locating with other USDA entities. Apparently, another FS official, Dee Ann Devenish, took that message to mean that Mr. Mrowka was asking to terminate. (G 47.)

75. By letter dated June 6, 1997 (AF 38-39), the CO issued a cure notice. In it the CO pointed out that based on Omni's building schedule (referring to the schedule of May 12), Omni was to apply for a building permit within 5 days of review and resolution of plans by the FS. She stated Omni was to submit completed construction drawings within 10 days of review and resolution of plans by the FS engineer. The CO pointed out that final resolution of the plans was completed during the meeting of May 19, 1997. She then calculated dates for progress milestones in relation to the time schedule Mr. Quayle had provided. She said the milestones showed issuance of a building permit and completion of construction drawings by May 24. It showed the start of construction and site work by July 5-19, and showed other activities with the last item, carpet, set for December 2-31, 1997. She then said:

As of this date, we have not received the final construction drawings. You have not submitted a firm written commitment for project financing from your lending institution as required by the lease and as requested in our meetings of April 25 and again May 9, nor have you submitted any evidence that you have applied for, or obtained a building permit.

Your lack of progress has created serious concerns about whether you have the capacity to proceed, and are able to provide, a finished, professional office building by December 31, 1997. In your letter of May 30, 1997, you stated you would do as the lease required; however, you have already fallen behind on your schedule.

This letter will serve as written notification that the Government considers your failure to submit final drawings, a firm written commitment for the financing of this

project from your lending institution, and evidence of the issuance of a building permit from the City of Richfield as conditions that are endangering performance of the Supervisor's Office portion of the lease. Therefore, unless I have verifiable documentation in hand that these conditions are cured no later than 2:00 PM, on the tenth day after your receipt of this letter, the Government will terminate a portion of this lease for default under the terms and conditions of the GSAR 552.270-28, Default in Delivery - Time Extensions (June 1994) clause of the lease.

(AF 38-39.)

76. Several days later, on June 9, Ms. Hinricks sent a message to Mr. Allan addressing the cure notice (G 12). He replied that it was good that she mentioned something about the quality of the workmanship, pointing out problems as to the janitorial service at the fire center (G 33).

77. The Government sent the cure notice by Federal Express, with Saturday delivery requested. It carried what the FS described as the last known address of Omni, which was 87 E. Center, Spanish Fork, Utah. The notice was labeled that it was sent by certified mail. The letter was delivered by Federal Express on Saturday morning, June 7 around 10:00 a.m. to Ms. Tracy Frazier. She was an individual who conducted business at Bayberry Loft, a business co-located in a building complex with the same address as Omni. (AF 40; App 68, paras. 87-8; App 83, paras. 1-4.)

78. Omni's office was closed at the time and Ms. Frazier accepted the package and signed the receipt as a favor or convenience to Mr. Quayle and the Federal Express delivery person. There was no formal agreement or understanding as to mail between Ms. Frazier and Mr. Quayle. Other than this package, she had never received anything for Omni. She did not know the seriousness of the package (AF 35-6; Tr. 7-9, pp. 23, 25, 27-8; App 68, paras. 30, 88; App 83, para. 3-9).

79. Mr. Quayle learned about the notice some time on either June 9 or 10. According to Ms. Gilbert, Mr. Quayle spoke to Mr. Allan and learned of the termination action. (AF 185.) Mr. Quayle's affidavit reflects he first learned of the termination in a telephone call with Ms. Gilbert on June 10, and as a result of that conversation had her fax him the cure notice (App 68, paras. 87, 89). It is not disputed that Ms. Gilbert told him that the FS considered the 10 days to start on June 8 (G 34). The Federal Express package remained in the possession of Ms. Frazier, or her husband, until after Mr. Quayle got the fax (Tr. 7-9, pp. 27-28; App 83 paras. 5-7; App 68, para. 87).

80. According to Mr. Quayle, after he read the cure notice on June 10, he believed the CO could not terminate until 2:00 p.m. on June 20. (Tr. 7-11, pp. 79-80, 307-08; App 68, para. 89.)

81. On June 10, Ms. Gilbert held a telephone conversation with Mr. Pitcher regarding the status of the financing on the lease. It is not evident who made the call. Her notes show that Mr. Pitcher said that he received the appraisal from Omni's appraiser on June 9. He reported that he was "preparing the loan documents for the loan committee approval at the next meeting." He identified the tentative meeting dates as June 12, 13, 16. If approved, he said he would be able to issue a firm commitment for financing within 2 to 3 days and the loan commitment would close about 2 weeks

after the commitment was issued pending no further holdups or review of documents by Mr. Quayle or his attorneys. He stated that Mr. Quayle had a draft copy of the loan for review now. (AF 233.) According to Mr. Pitcher, by this date he concluded that Omni's loan satisfied Equitable's criteria that he would recommend to the loan committee and based on his past track record it would be approved. (Tr. 7-7, pp. 277-78, 314-15, 318.)

82. On that same date, Bank One, which was no longer actively being pursued for the loan by Omni, sent a letter to Omni, apologizing for its lateness, declining to provide a loan. In the letter, Mr. Robert Freil, of Bank One, noted concerns as to what he described as the weakness of the package during the course of construction, specifically referring to lack of experience and financial strength of the contractor, which was presented, lack of cash equity on the project, the amount of sweat equity required to complete the project, and lack of liquidity of the guarantors. There is no evidence that the Bank One letter was known to the FS at any time prior to the termination of the contract. Moreover, at the time of the above referenced letter, the FS was operating on the basis that Omni was seeking the loan from Equitable. (App 154.)

83. On June 12, 1997, the CO addressed in a letter various points made by Mr. Quayle as to the cure notice and "the form in which you provide the final construction drawings." The CO noted that the cure notice was delivered on June 7 to the business address given to the FS. She stated that therefore the cure notice period began on June 8. She stated that he was "responsible for complying with the cure notice by submitting the items required in the manner you deem appropriate." She then stated, "To restate the cure notice requirement, we must have verifiable documentation in hand that the conditions specified in our June 6 letter are cured no later than 2:00 p.m., June 17, 1997, or we will terminate the Supervisor's Office portion of the lease for default under the terms and conditions of the GSAR 552.270-28, Default in Delivery - Time Extensions (June 1994) clause of the lease." (G 21.)

84. Several days passed and according to Omni, Mr. Quayle informed the CO, by telephone, on June 17, 1997, that Omni would receive a loan commitment on June 25, 1997, that final construction drawings were waiting approval from the county building department and he expected to obtain the building permit the following week, around June 25 or 26. Mr. Quayle relied on a June 17, 1997, letter to Omni from Mr. Pitcher. Mr. Quayle stated he provided it to the CO on or about that date, but was not sure whether he faxed it on the 17th, but did recollect that it was almost immediately after he got it. (Tr. 7-11, p. 59-61; App 68 para. 93.) Mr. Quayle also understood that Mr. Pitcher provided a copy to the FS on June 17 (App 68, para.92). The letter from Mr. Pitcher stated:

As I informed you last week, our Board was at meetings in Florida last week. I have completed my write- up and recommendation for your loan and distributed same to our committee members. Loan Committee is scheduled for Friday of this week. Assuming that your loan is approved then, it will likely be Wednesday of the following week [i.e., June 25] before I can have your loan commitment for you. As soon as it is signed and returned by you, we will begin to prepare loan documents for the closing." (AF 183.)

While Mr. Pitcher did not guarantee in the above letter that a loan would be issued, Mr. Quayle contended that from earlier assurances given the FS by Mr. Pitcher, where Mr. Pitcher said he had never had a loan turned down like this and he was recommending it, Mr. Quayle thought the loan was forthcoming and the loan committee was simply a formality (Tr. 7-11, p. 59).

85. As reflected in the CO's notes of the same June 17 telephone conversation, Mr. Quayle asked for more time. The CO reported that he told her that Mr. Pitcher was unable to get financing completed but would have the loan by Wednesday next week. Regarding the building permits, he said that the City would not have it done until the next Wednesday or Thursday. As to the drawings, he said that because of the minimal changes, he had planned to redline the construction drawings. He said he would do what the FS required but redlining was all he had planned, as to the drawings. The CO recorded that she stated, "I said send me what you have, I'll review it and let you know. But I may choose to continue with the termination." (AF 227; App 68, paras. 92-93; App 76, para. 23.) Mr. Quayle testified that the CO's reaction to his information was not what he expected. Instead of saying "oh, that is great, we will get started. She just said, well, at this point, I don't have it, so I am going to terminate it. And" (Tr. 7-11, p. 63.)

86. On the same day, following soon after the above conversation, Appellant's attorney, Mr. Steadman, spoke to the CO regarding the cure notice. He memorialized the conversation in a letter to the CO dated June 18, 1997. (AF 33-36.) He stated that he told the CO that Mr. Quayle had assured him all of the issues were resolved, that the building permit could be obtained and the financing could be obtained. He asked her what documentation could he help her get and what he could do to reassure her on these issues. He noted "[But] [s]he didn't need anything[]"["No, we're going to terminate it, so we don't need anything. Thank you.["] He stated, "so I spent 15 minutes from our list trying to keep her from hanging up on me." He stated that the position she took as to the status of the lease was that the FS was going to terminate it. He stated, "They just had no confidence that it would be built and she didn't care, she just wanted to terminate it." (Tr. 7-10, pp. 47-48, 50-51, 62-64.)

87. The CO also made notes of the conversation with Mr. Steadman. The notes reflected that Mr. Steadman told her that "He" (referring to Mr. Quayle) went to another lender to get financing. Mr. Steadman wanted to know why Mr. Quayle was not on track with having the building completed by December 31. He discussed the three items and said Mr. Quayle did not have the items. She records that he said plan changes were minor and he had a letter from the insurance company. She then noted, she explained, that based on the construction schedule Mr. Quayle provided, he was already behind on these three things. As a result, she had concerns regarding what he said as a completion date. She wrote that she told the attorney to send her what Mr. Quayle has. She said she would take it to her attorney and they would review. She then stated, "if he feels he can make the December 31 date, have him show me how he plans to accelerate this schedule to have the building done by December 31. However, I won't guarantee we will still not proceed with the termination." Finally, she noted that the attorney had told her that he had been called off vacation with his family and needed to get back so he would send her something the next day. (G 22.) Mr. Steadman, in his testimony, addressed the specific notation that the CO invited him to submit additional data. In response to that, he said, "She not only didn't make that statement, when I told her I'd send her a follow-up letter, she indicated she did not need it. And that is why at the bottom of my first page of

my letter, I said if a more detailed schedule would help reassure you, we will provide one. I wouldn't have said that, had she said send us a more detailed schedule. I mean, I would have sent her the more detailed schedule instead of saying we'd be happy to if it would help."(Tr. 7-10, p. 64.)

88. In addition to recording the conversations with Mr. Quayle and Mr. Steadman, CO also made notes of a conversation she had with Mr. Moffett in Engineering, on that same day, where they discussed completion of the building based on what he had, and where they were as to the lack of a fund commitment. Mr. Moffett stated that "If he was a well organized professional and stayed on top of things, it would be a challenge but he's seen buildings this size completed. But based on what's been done on the Fire Center we have knowledge he's not been paying his subs - so the good subs may not be willing to perform on an accelerated schedule. Based on construction in Utah right now, finding subs (even good ones) is difficult because of the 2002 Olympic construction." (G 22-23.)

89. As stated above, Mr. Steadman followed the June 17 conversation with a letter to the CO, dated June 18, which he faxed that morning. There, he stated that the schedule Appellant had provided to the FS the prior month had over 30 days of cushion. He noted that Mr. Quayle, through experience, had been taught that one should always include cushion time for emergencies that could arise. He then addressed each of three issues set out by CO. Regarding the building permit, he asserted that the City building inspector had the plans and expected to complete the review before the end of that week. The deadline for obtaining the permit, after the final approval, would be the first week of July, before construction began. Regarding the final plans, he stated that as soon as Mr. Quayle received final City approval, he would still have to incorporate minor changes, however, any of those changes from the City would be redlined onto FS plans. Finally, he stated that the deadline for the loan commitment and documents is the day before construction begins. He stated that Mr. Quayle was ready to go, as soon as he received the loan. He continued that Mr. Quayle had received all approvals except for the final from the insurance company board, which he expected the next week. He told the CO that apparently the board had a meeting in Florida that delayed its ability to act on the matter until they returned, which would be the end of the week. (AF 33-37.) Late in the morning of June 18, 1997, after faxing his letter, Mr. Steadman again telephoned Ms. Hinricks to see if there was anything else he needed to send. Ms. Hinricks spoke to him at 3:03 in the afternoon and repeated her concerns regarding Omni's ability to meet the construction date. She said that she explained that they had given him (Omni) every opportunity to obtain financing. Mr. Steadman asked if his letter answered her three items and she indicated it did not. She told him that the lease had been awarded last year and that the present leaseholder wanted a year's rent regardless of the December 31 occupancy date. She said she had given Mr. Quayle one more week for 4 months since March. The original occupancy date had been extended once already. She said if Mr. Quayle was an astute business person, wouldn't he have already received his construction loan. She then stated that "He's had 14 months with (unreadable) months notice and follow-up." In context, the unreadable is likely 4 months. (G 24.)

90. By letter dated June 18, 1997, faxed that afternoon at 3:09 p.m., the CO terminated Appellant's contract. She stated:

Reference my June 6, 1997 letter which was delivered on June 7. The ten-day cure notice period expired on June 17 at 2:00 p.m. In our telephone conversation yesterday, June 17 at 1:20 p.m., you stated that you would be unable to furnish final construction drawings, a firm commitment for financing or evidence of the issuance of the building permit for the Supervisor's Office portion of this lease, as required by my cure notice, until sometime during the week of June 23. This time line is not acceptable according to your own construction schedule. You stated that you would be working on an accelerated schedule but you have provided no evidence to show how you would accomplish the project by December 31, 1997.

Because you have failed to cure the deficiencies, this is your notification that the Supervisor's Office portion of [the lease] is hereby terminated under Clause GSAR 552.270-28, . . . effective today.

(AF 29-30.)

91. When asked at her deposition, why she took the default action, the CO stated, "because Mr. Quayle could not obtain financing." (App 135, p. 40). She later stated that the financing was one of many reasons, citing to her cure letter, which addressed several items. She said she considered the schedule that Mr. Quayle submitted to her on May 12, 1997, and found it to be inadequate and incomplete. She stated she had communicated that to him. (App 135, pp. 45, 50, 110-12). Other than the schedule and the other reasons identified for termination in her cure notice, she stated at her deposition that there were "none other that she could think of." (App 135, p. 149). Although she noted in an exchange that she had a problem as to Omni's ability to complete and the feasibility of Omni completing, she acknowledged the basic problem was that Omni did not have financing. (App 135, pp. 174-78.) Finally, in reference to what Omni needed as far as loan approval, she said that loan approval would be a firm commitment of funds under Para. 1.9 of the solicitation. (App 135, p. 139.) She further stated that had Omni gotten the loan approval any time during the cure period, it would have been OK (App 135, p. 167-68).

92. As to the status of the land, the testimony of Mr. Farnsworth, the City Manager, and Ms. Ogden supported the conclusion that the land transaction would have closed, had the contract not been terminated, and had Omni secured financing. Ms. Ogden stated that as of July 1997, it was her understanding that it was still possible for the sale of the property from the City to Omni to close. She noted that at no time did Mr. Farnsworth even mention that the transaction was required to close by a particular date or that the City was losing interest in selling the property or not completing the transaction. Her communications with Mr. Farnsworth led her to believe that in July, the City would go forward with closing the sale of the property, once Omni obtained the necessary funds. Finally, based on her experience, at any time prior to September 1997, the sale of the property to Omni would have formally closed within one business day after the title company received funds to cover Omni's down payment. (G 175, paras. 17-18.) She also stated that the clearing work done on the property should not have caused a delay in closing (Tr. 7-9, p. 8).

93. The FS, in its brief, asserted that there were problems as to the status of land at the time of the termination, because the resolution had expired. The FS asks us to find that Omni could not have secured the land in time or that the CO was reasonable in making such a conclusion. The FS supported its claim that the land was not going to transfer by citing a statement made by Mr. Farnsworth in his May 12, 1999 deposition. There, he stated that since the motion passed by the City required the balance of the purchase price to be paid by June 1, 1997, once the date passed there was no longer a valid agreement to sell the property. At the hearing, Mr. Farnsworth clarified that statement, stating:

This statement should not be construed to mean that the sale of the Property from the city to Omni was either impossible or unlikely after June 1, 1997. While the city may have been no longer obligated to sell the property to Omni after June 1, 1997, based on my communication with members of the city council, it is my understanding that even after June 1, 1997, the City Council anticipated and remained committed to completing the transaction with Omni according to the terms set forth in the closing documents drafted by Linda Ogden. (Tr. 7-10, p. 44-47; G 176, para. 24..)

94. Mr. Farnsworth stated that at the City Council meeting of November 12, 1996, the council did not establish a firm date by which the sale of the property was to close. He pointed out that although it was expected by both Omni and the City that the transaction would close in early January 1997, the council never indicated that its agreement to sell the property to Omni would terminate if the transaction failed to close by that time. Instead, the only date mentioned in the minutes "June 1, 1997," referred to the due date of Omni's final payment for the property, which the parties anticipated would occur approximately six months after closing. (G 176, para. 19.) Mr. Farnsworth further stated that based on his communications with members of the council, it was his understanding that at all times, from January 1997 through at least the late summer 1997, the City Council supported and anticipated Omni's planned development of the property and the City was ready, willing and able to sell the property to Omni the moment Omni obtained funds to close the transaction. In addition, at all times from January 1997 through at least August 1997, the City's commitment to the transaction was never in doubt and was never subject of discussion by City Council during meetings he attended. (G 176, paras. 26-27.) Finally, if the City Council had confirmed that D Land Title had received the certified funds sufficient to close the transaction in June or July 1997, the City was willing to let Omni immediately enter the property and commence construction. (G 176, para. 28.) Mr. Farnsworth stated that he did not believe that the City Council would have had to amend the terms of the sale in order to close after June 1, 1997 (Tr. 7-9, p. 52). Also, at some time in mid-June 1997, Mr. Quayle and Mr. Blaine Hancey stopped at the office of Linda Ogden. It was her understanding at that time that Mr. Hancey was working with Omni to arrange for construction financing. The three discussed the status of the sale of the property from the City to Omni. She told Mr. Hancey and Mr. Quayle that it was her understanding that the transaction was ready to close as soon as D Land Title received funds to cover Omni's 50% down payment of the purchase price. (G 175, p. 16.)

95. The FS made a number of assertions dealing with what it described as difficulties that Omni was having as to the building permit and construction plans. The FS pointed out that the County made numerous corrections each time Omni submitted the plans. Neither party disputes that the plans were submitted to the County in late May (the FS identifies this as the third time) or early June

1997 and that on June 25, 1997, the County sent Omni a series of comments on the submittal. The FS charges that Omni did not make the changes, pay the permit fee or ever have a permit. Of course by that point the lease was terminated. The affidavit and testimony of Mr. John Hicks, the building inspector for Sevier County, who was in charge of reviewing the plans for the building, does not comport with the FS contention that the permit or approval of the drawings was in trouble. Rather, his testimony shows the permit would have almost certainly been approved and in time to complete the structure by December 31. He confirmed that Mr. Quayle submitted all the necessary information to him by June 17, 1997, to allow him to issue a building permit. He said he had reviewed the County changes set out in the county's plan review, which was faxed to Omni on June 25, and based on his prior experience reviewing building plans and issuing building permits, it was his opinion that the changes could be made without too much of a problem. He said the changes did not require Omni to prepare and submit an entirely new set of plans and the corrections could have been marked onto the plans. Based on his experience, an engineer could have prepared the addendum within a few days and then all his office needed to do was to re-check the existing plans or the addendum to assure that Omni's engineer had resolved the issues listed. (Tr. 7-9, p. 35; App 93, paras. 13-14.) Mr. Hicks confirmed that, "it was possible for Omni to obtain a building permit on the same day his office rechecked both sets of drawings and confirmed that all issues had been resolved." He said the Building Department would have issued Omni a building permit on the same day that (1) the Building Department rechecked both sets of plans and confirmed all issues had been resolved, (2) Omni had submitted a completed application for a building permit, and (3) Omni paid the required permit fee. (App 93, paras. 4-5, 14-15.) In late June, Omni had sufficient funds, at a minimum through Richard Gaustadt, one of the investors in the project, to cover the permit and had partially completed the application form. Once the County signed off on the permit, as was likely by the end of June, this would no longer have been an impediment to the start of construction. (Tr. 7-10, pp. 30-33, 40-41; App 68, pp. 101, 107.) The FS is correct that Omni never secured a building permit and never paid the \$200 fee. That assertion, however, is of little importance, since the job was terminated prior to the County completing its review on June 25. The fact that Omni did not continue on after the termination is implicitly reasonable, and we will draw no negative inferences for actions not taken after that date.

96. The FS presented additional testimony as to the status of the loan as of June 18 from Mr. Pitcher, who the FS called as its witness in an attempt to call into question the likelihood of the loan. The following exchange took place between FS counsel and Mr. Pitcher.

Q. As of June 18, 1997, had Mr. Quayle received any approvals from Equitable Life and Casualty on his loan?

A. As stated earlier, its [sic] either approved or it's not approved. Certainly, I had done my analysis and had made my recommendation. But the loan isn't approved until it's approved. It is not a state [sic] process. (Tr. 7-7, pp. 226-27.)

97. The witness was then questioned by the Administrative Judge.

Administrative Law [sic] Judge: All right. Let me ask you this, Mr. Pitcher. We can wash the words all we want here and read them but saying so far you have received the approvals needed except for final approval from the insurance company board. As of June 18 was the thing that Mr. Quayle was waiting for was final approval from the insurance company board, is that a fair statement?

Mr. Pitcher : I'll answer your question, Your Honor, indirectly. I remember if the loan was approved the exact date, I don't recall. But it was around that time and it may not have been yet approved that day.

Administrative Law [sic] Judge: When you say the loan was approved , approved by who?

Mr. Pitcher: By the committee.

Administrative Law [sic] Judge: Okay

Mr. Pitcher: The exact day of the approval I don't recall.

(Tr. 7-7, p. 227.)

98. As of the June 18 letter from Mr. Steadman to the FS, Mr. Pitcher's loan recommendation was waiting formal approval by the loan committee. As of June 18, Mr. Pitcher did not envision anything standing in the way of the approval by the committee. (Tr 7-7, p. 228) That conforms with what Mr. Steadman told Ms. Hinricks on the day before the termination and confirms with what Mr. Pitcher represented in his letter to Appellant of June 17. By June 25, the date Mr. Quayle and Mr. Steadman had identified to Ms. Hinricks as the date on which the loan would be approved, the loan committee had already made its approval. That is what Mr. Pitcher's letter anticipated. The approval was for a construction and a permanent loan. (App 82, para. 17; Tr. 7-7, pp. 226-227.) It is of note that Ms. Hinricks stated in her deposition that had the approval been completed prior to the close of the cure period, it would have satisfied her request for a "firm commitment of financing." She stated that she considered a firm commitment for financing to be loan approval. (App 135, pp. 157, 167.)

99. After the approval by the loan committee, other items needed to be completed by Omni before Equitable would actually disburse the loan. Closing on the loan was not guaranteed by the loan approval. If Equitable had found information that it was uncomfortable with, it could have withdrawn the commitment; however, as Mr. Pitcher acknowledged, Equitable was looking to try to avoid that if possible, because this was a government lease. (Tr. 7-7, p. 233.) In his affidavit of July 15, 1999, Mr. Pitcher addressed the procedure, tracking it from loan approval to putting money into Appellant's hands. He stated that the approval typically causes a loan commitment to be issued and a borrower typically has 10 days to accept it in writing and to pay the "lender's standby fee" (fee). Based on his experience and prior practice, depending on the borrower's review of the loan papers and its ability to produce the requisite fee, a loan typically closes around 2 weeks after the borrower returns the signed loan commitment and fee. In Omni's case, Omni had in its possession a copy of

most of the required loan documents since April 18, 1997. Based on his experience and practice with loan closings of this type, it was his opinion that assuming Omni quickly returned the commitment and could provide the requisite fee, Omni's loan would likely have closed sometime between July 9 and July 14. (G 56, paras. 19, 20.) During his testimony, Mr. Pitcher reiterated that because this was a federal government lease, it would have been given Equitable's top priority and Equitable would have tried every way it could to make the deal work (Tr. 7-7, p. 200.) The 2-week time frame, referenced in his July 1999 affidavit for closing the loan, comported with what he had told Ms. Gilbert on June 10, 1997, several days prior to the termination. (AF 233; G 56.)

100. Mr. Pitcher testified that a commitment is good for 90 days from the date of issuance, which gives a borrower 90 days to close and fund the loan. Because of the loan committee's approval of Omni's application, if Omni had informed him within 30-60 days of approval that the FS lease was reinstated, Equitable would have reactivated the loan, the approval and the loan commitment. Some time on or before June 25, 1997, after being terminated, Omni notified him and asked him not to incur any additional costs until Omni saw what happened. (G 56, paras. 18-20.)

101. The FS cited to testimony it drew from Mr. Pitcher to support the proposition that even with approval, the loan could not have closed on time. In this testimony, Mr. Pitcher stated it would have taken at least 3 weeks to get needed third-party reports, which were part of the closing process, implying that the process would have taken even longer. (Tr. 7-7, p. 212-13.) From this, the FS asserts that Omni could not have closed by July 5, using July 5 as a firm date for the start of construction. In this same testimony, Mr. Pitcher stated that he should not have approved the loan, or recommended it, given the way the appraisal report stood. He said that he should have cut the loan and he did not remember his rationale for why he recommended the \$1.73 million loan. He confirmed that he saw a problem with the debt service ratio. Finally, he testified that he was puzzled why he recommended the loan and stating, "I can only surmise that I thought the NOI, net operating income, may improve or I wanted to see what his final numbers were." (Tr. 7-7, pps. 242-43.) Despite these revelations, there is no evidence that the CO, at the time of termination, had any of this information. Rather, she had representations by Mr. Pitcher that consistently represented that the loan could close within 2 weeks of the approval. (AF 233; Tr. 7-7, pp. 99, 200, 233; G 56.) Moreover, virtually all of Mr. Pitcher's second guessing of the loan and his pronouncements as to time needed to complete the process were also matters that were never brought to the attention of the CO at the time of the termination. His new version of events formed no part of her decision to terminate and in fact conflicted with his earlier affidavits and with his actions prior to the termination.

Finally, notwithstanding testimony raising questions as to the strength of Omni's financial package, the fact is Mr. Pitcher recommended the loan to the loan committee and the committee approved it. Further, repeatedly, Mr. Pitcher had represented that Equitable would do what it could to make sure the loan went through. (Tr. 7-7, pp. 227, 301.) As he pointed out, government leases were Equitable's "number one preferred style of mortgage lending." (AF 205; App 82, para. 11.) Also, on June 10, between the issuance of the cure notice and exercise of the termination, Mr. Pitcher represented to Ms. Gilbert that the loan could close within 2 weeks of approval (AF 233). Finally, in his affidavit in July 1999, he did not raise questions as to the loan not being able to close. That did not come up until he met Mr. Johnson, when Mr. Johnson was interviewing individuals for his report. (Tr. 7-3, p. 283; G 56, 61.)

102. In addition to its loan activity with Equitable, Omni submitted an application dated June 19, 1997, for financing (Loan Application Agreement) to Mr. Blaine Hancey at MIC. (Tr. 7-11, p. 210; G 189) The loan agreement called for MIC to receive a 10% equity interest in the Omni property. (Tr. 7-11, pp. 75-6; G 189.) The agreement also called for Mr. Quayle and Mr. Rounds to be individual guarantors, along with Omni. Mr. Hancey described Mr. Rounds as a good friend and stated that Mr. Rounds brought him and Mr. Quayle together. (Tr. 7-10, pp. 82-3; G 189.) Mr. Rounds testified that he had not seen the application at the time it was submitted, but he had been prepared to guarantee the loan had the termination not occurred (Tr. 7-8, pp. 71, 74-5). Mr. Hancey testified he could close the loan within a short time of getting the lease and Omni completing the land purchase and providing title (with first lien). If he had that in place, he could have closed by July 1. (Tr. 7-10, pp. 102-104.) At another point, because of hearing what he described as rumblings with the project, Mr. Hancey contacted Omni on July 1 and said he could not close by July 5. This, however, was after the termination. (Tr. 9-23, pp. 43-45.) Mr. Hancey was looking to place a loan of \$1.7 million to fund the construction, as distinguished from a permanent loan (Tr. 7-10, pp. 84-5). Mr. Hancey also addressed a requirement of the loan agreement that Omni provide a \$300,000 letter of credit as part of the application. He stated Omni had identified those persons involved in the project. Some were providing their work and others funds. He recalled one party who could provide a letter of credit for \$300,000 and pointed out that anyone who lends money always put in as much as they can get (meaning collateral). That is why he listed the requirement (Tr. 7-10, pp. 98-9). He also stated that all conditions he listed in the application did not have to be completed for him to issue the loan. He then stated, "In fact, I don't believe that ever came to fruition when I approved the loan," there referring to Omni providing the actual letter of credit. He reiterated that he had ultimate authority to approve the loan and with that came the authority to make changes to the requirements. (Tr. 7-10, p. 100.)

103. Mr. Loyal Anderson testified that Omni wanted a line of credit to help in acquiring financing and he was prepared to provide it through Lewiston Bank, which agreed to extend it. (Tr. 7-8, p. 143.) He said he had \$300,000 available if there was an overrun, and pointed out that in Cache Valley (the area in which he resides), handshakes are just as binding as a written document. He stated that when Lewiston Bank committed the \$300,000 that was as good as a written document. (Tr. 7-8, pp. 28, 33.) He said that Lewiston Bank had enough confidence "in us as a corporation and family members" that if we wanted the line of credit we would get it. He said they had sufficient funds in the bank to cover it (Tr. 7-8, pp. 152-53). He acknowledged that he never did secure the letter of credit from the bank, but repeated that he had secured a commitment through a line of credit. (Tr. 7-8, pp. 150-154.) Mr. Anderson stated that his family had a long-term relationship with Lewiston Bank, having dealt with the bank since 1936. (Tr. 7-8, p. 144.) The letter of credit never got finalized because it would be concurrent with financing of the construction loan, and they were waiting for that. Once that would have been done, the line of credit would have been in place (Tr. 7-8, p. 145.) Mr. Anderson had a 10 % interest in Omni (Tr. 7-8, p. 146).

104. MIC's loan application agreement contained a number of requirements. Item 3 of the agreement required the lender to conduct due diligence of the principle operators and owners of the applicant and project. (Tr. 9-23, p. 9; G-189.). Mr. Hancey stated that he understood the owner of

the project to be Omni Development and he said he was aware of other owners or operators, who owned part of Omni, identifying Arlyn Rounds, Loyal Anderson, Sherwood Kirby, and others. He pointed out that he knew Mr. Anderson and Mr. Kirby within the community and knew of Mr. Kirby for many years. Mr. Hancey secured information on others who were providing sweat equity. In addition, Mr. Quayle provided him with other information. Mr. Hancey stated that he did not review individual financial resources or the financial details of Omni, but noted that Mr. Rounds and Mr. Quayle were going to sign as guarantors of the loan. In response to FS counsel's statement that due diligence had to do with an investigation of the financial condition of individuals involved in the project, Mr. Hancey pointed out that the contingency was not hard and fast and that he could modify it anytime he wanted. In later questioning as to due diligence, he replied that he had completed his due diligence, was satisfied on that point and characterized the due diligence as "knowing the individuals involved." He testified that he made the decision to go ahead with the loan because it was a hard asset loan and he felt he did not have to take apart each person's financial string, because he could control through the disbursement of funds on a loan the value of the assets that were going to be acquired. Mr. Hancey stated that he reviewed the cost of the project, the pay out on the long term mortgage, the forest service lease income and other financial data and reviewed and was satisfied with the subcontractor bids. (Tr. 9-23, pp. 10-11, 16-19, 21, 31.)

105. On June 25, 1997, MIC issued a commitment letter to Omni, allotting \$1,700,000 to the construction loan. The commitment letter was conditioned upon fulfillment of the conditions in the loan application agreement. (Tr. 9-23 p. 15; Tr. 7-11, p. 214; G 191.) On June 25, 1997, Omni entered into a supplemental agreement with MIC, in which Omni agreed to change paragraph 3, Section 4 of the loan agreement. The new language essentially provided that should the lender submit a commitment for financing within a blank period specified in the agreement, and the applicant defaulted in accepting and completing the loan transaction, then the applicant was to pay the lender a fee of \$50,000. The agreement then continued that if the failure was due to the sole reason that the FS fails to commit to occupy or sign a lease agreement, on similar terms found in the April 14, 1997 lease, then MIC's damages which had been stated as \$50,000 would be modified so that MIC would be entitled to an immediate \$5,000 and the balance of \$45,000 would be paid solely out of the first monies received of any recovery against the FS. In this agreement, Omni also agreed to aggressively pursue any claims against the FS for failure to occupy. Otherwise, such failure would entitle MIC to \$50,000. As of the date of the hearing, nothing had been paid to MIC. (Tr. 7-11, pp. 48-50; G 190.)

106. According to Omni, it deemed the termination notice it received on June 18, to be void, because the 10-day cure period from when it had received the notice had not elapsed. On June 23, 1997, Omni informed the CO, through Ms. Gilbert, that Omni was still actively arranging for financing and anticipating the commencement of construction in early July. (Tr. 7-11, p. 79; App 68, paras. 89, 96-97.) The CO terminated the lease 17 days before construction was scheduled to begin, using as a basis the May 12 schedule referenced in the FS cure notice (AF 38). There are 180 days between July 5 and December 31. As of the date of the termination, Omni had 197 days before reaching the tentative occupancy date of December 31, 1997. In a separate construction schedule, which is not clear as to the date, but provided to Mr. Allan, Omni showed the start of construction as July 5. (G 114.) The initial activities on that schedule were excavation and grading. Much of that

work had already been completed by Mr. Foster, even though there had been no contract. (Tr. 7-8, p. 187.) Work on the foundation, the next activity, was shown to start on July 20 and run through August 4, 1997. The schedule in G 114 did not break-out or provide any details as to how Appellant would handle the stacking of trades.

107. As addressed earlier, during the period prior to exercising termination, the CO discussed the remaining delivery time and Omni's ability to complete with Mr. Moffett. He expressed reservations based on his perception of Omni's professionalism. At his deposition, Mr. Moffett testified that the various activity durations on the schedule were reasonable. He tried to back off that at the hearing. (AF 198; Tr. 7-2, p.121; App 22.) Ms. Hinricks stated that she understood Mr. Moffett's views on completion to mean that if Omni "had all the professional people and [it] could get good subcontractors. . . and [it] was well versed in construction and that type of thing, that [Omni] would be able to meet that December 31st occupancy date." (AF 227; App 135, pp. 215-216.) In making her conclusion as to Omni being able to complete, she did not perform an analysis about the likelihood of whether Omni could meet the occupancy date, regardless of when Equitable's loan was approved. She cited as part of her decision, concerns that Appellant could not get good subcontractors because of the 2002 Olympics in Salt Lake. She acknowledged that the effect of the Olympics on subcontractor availability was speculation. (Tr. 7-2, pp.215-218; App 135, pp.170-171, 215, 218.) She was asked the following, "Based on your knowledge at the time, what was the last day that he could have gotten his financing in order to be able to complete, substantially complete the building by December 31st, 1997." She responded, "I don't - I have no idea. I have no idea at all. (App 135, p. 175.)

108. Corey Winkle, a potential subcontractor for Omni, also provided some information as to the time needed to complete. He said he did not know if Omni could complete in 6 months. He said that framing would take 8 to 10 weeks, but also pointed out that one can stack subcontractors so that once a contractor has done the first floor, the contractor would have the electrician, plumber and others in. He thought that 5 months was a tight schedule. (Tr 7-9, pp. 184-85.)

109. It needs to be repeated that the CO was not primarily focusing on Omni's construction capabilities in assessing whether to terminate. In an exchange during the CO's deposition, counsel for Appellant asked her about various potential start dates and whether that would have allowed Omni to start construction on July 5. She said she thought he could start construction if he had approval by June 17. In further questioning she agreed as to June 18. As to June 19, she stated, "He'd had been too late to be due - based on the cure period." When further pressed she said she did not know. (App 135, pp. 169-172.) Finally, the question was asked as to "what was the last day that he could have gotten financing in order to substantially complete by December 31." She could not come up with an answer. (App 135, p. 175.)

110. After the Appellant received the notice, Omni tried to talk to the CO again, but was unsuccessful. Omni arranged a meeting with the regional forester to be attended by Mr. Quayle and Mr. Kirby. The forester decided not see them, but they did meet with Brent Perks, another FS official. He said he would review the file and meet them the next day in Richfield. He did not show

up and no follow-up meeting was held. Subsequently, Mr. Quayle got a letter from Mr. Perks saying the termination stood. (Tr. 7-11, pp. 77- 78; App 68, paras. 105-06.)

111. On July 15, 1997, Mr. Quayle wrote a letter to Omni's potential stockholders and updated them as to the attempts through a Washington, D.C. law firm to reverse the termination, and if unsuccessful, to sue to minimize or eliminate any damages and to recover what would be available to Omni. Omni sought contribution (G 109.) On September 10, 1997, the Board received a notice of appeal from the termination, which the Board docketed as AGBCA No. 97-203-1.

112. On April 2, 1998, Omni submitted a certified claim for \$1,714,000, which was composed of \$1.3 million in anticipated profits and \$489,622 in expenses (Tr. 7-11, pp. 178, 180; G 209). The breakdown was as follows:

Expenses	\$ 489,622.00
Lost profit in building	\$ 1,299,257.00
Cash flow	\$ 130,023.51
2% increase in value of building	\$ 284,864.00
Total	\$ 2,203,766.51

(G 209.)

113. By letter of June 5, 1998, Ms. Hinricks issued a final decision on the dollar claim. As to the lost profits, she stated that Omni never held the deed and without property ownership, the lease could never have been completed. She stated that as a result, Omni made no investment and was not entitled to damages requested. She also stated that the SF-2 was considered secondary to the award, which she pointed out preceded the issuance of the SF-2 by a year. She said that property ownership and the ability to obtain financing were contract requirements identified in the solicitation. If the property was secured in the beginning, as the FS was led to believe, the issuance of the SF-2 would have been a procedural matter used to establish the beginning of the lease term. She then addressed claimed expenses of \$489,622. She said that the expenses also included the Fire Center and appeared to be double billing for similar services. She questioned a sum for Kirby Design, for the building permit and travel expenses, stating there was inadequate detail. She cited contract paragraph 1.9 Award, which said that within 15 days after award, Omni must provide the CO the license or certification of the individual and firm providing architectural and engineering design services to practice in the state where the facility was located. She stated that Mr. Kirby was not a licensed engineer or architect and that the drawings were provided by another individual. She said that it appears the design costs were inflated and questioned the costs of professional workmanship. The CO asked for an invoice showing purchase of building permit with the purchase date in the amount of \$1,910.67. She said that travel expenses were unsubstantiated and not shown to be related to the contract in any way. She denied the claim. (G 26, 209.) The contention as to Mr. Kirby had never previously been raised.

114. Mr. Kirby was a draftsman, not an engineer or licensed architect. He had professionally put together a number of buildings, some with Mr. Rounds and others with Mr. Anderson, but had not

previously designed a building of 30,000 square feet. (Tr. 7-2, pp. 132-33, Tr. 7-7, pp. 34-5.) While Mr. Kirby did the drafting and prepared the plans on the building, and did so as sweat equity, the final work was approved by an engineer, Chris Jansen, and would have been stamped by Mr. Jansen. (Tr. 7-8, p. 120.) Mr. Kirby, as was the case with others involved with Omni, had a percentage of the project. (Tr. 7-8, p. 115.) The drawings never got a final engineer stamp, however, Omni's intent was to have the drawings stamped once the project was approved. Because of the termination, that was not done. (Tr. 7-8, pp. 124-25.)

115. On July 10, 1998, the Board received a notice of appeal, docketed as AGBCA No. 98-182-1, from Omni disputing the CO's June 5, 1998 denial of Omni's dollar claim. (G 26). On April 26, 2002, Omni amended its dollar claim and withdrew the request for the \$489,622 in expenses. At the hearing it made some adjustments in its reversionary interest claim, acknowledging a need for an adjustment for the final debt payment.

COST TO CONSTRUCT THE BUILDING

116. The FS asserts that it would have cost Omni \$2,704,439 to build the building and bases that upon the figures provided to Rigby by Omni for use in the 1997 appraisal. (Tr. 7-7, p. 70; G 125, 196). In the 1997 appraisal, Rigby revised the construction cost amount upward to \$2,954,643, which included the addition of \$248,604 as entrepreneurial profit (G 196). The FS pointed out that Rigby made an alternate calculation of construction costs which totaled \$3.1 to \$3.3 million. That was based upon a construction cost index, Marshall Swift Index. (G 196.) The FS contended that since Omni was seeking a loan of \$1,730,000 from Equitable, the difference of \$974,439, between the loan and the \$2,704,439 (cost to construct) represented the equity Omni would have had to contribute to the project (beyond the loan dollars) in order to build the supervisor's office. To support this the FS relied on Kelley Johnson (its costing expert), who relied upon the Rigby cost breakdowns that he had seen. (Tr. 7-3, pp. 143, 148; G 195-96.) In arguing its view of costs, the FS did not address with any specificity the testimony from Omni as to changes in the project which reduced costs, nor did it address Omni's testimony as to the retail/wholesale relationship of some of the suggested costs. It also did not seriously challenge any of the subcontractor quotes provided by Omni. Instead, the FS essentially rested on the \$2.7 million number. It did contend that Omni's various cost estimates were not consistent, the estimates were based on outdated and expired bids and the estimates were based on undocumented donations of sweat equity. In general, the evidence showed otherwise.

117. Appellant, through Mr. Quayle, presented detailed testimony supporting construction costs of between \$1.5 million and \$1.7 million. Omni hoped to borrow \$1.7 million from MIC. Mr. Quayle acknowledged that the \$1.7 million did not include sweat equity, and that if sweat equity had not been included, Omni's costs would have increased "dramatically." "Dramatically," was never quantified or defined. The \$2.7 million did not represent what Mr. Quayle expected to expend on construction. (Tr. 7-11, p. 221.) Mr. Quayle's explanation as to costs was supported by Mr. Rounds and Mr. Anderson. Mr. Rounds, who had been active in property development, including some leased properties to USDA, commented on costs versus the appraisal numbers and stated that appraisal numbers are quite different from cost numbers. Mr. Anderson, another investor who also had experience in development of properties, stated that an appraisal figure is not what you use to come

up with costs of a project. (Tr. 7-8, pp. 4-6, 85-6, 139-42, 159.) In addition, Mr. Eldon Peterson, Mr. Quayle's brother-in-law, was also involved on the project and the two had previously worked together on construction projects in five different cities (Tr. 7-31, pp. 15-16).

118. A number of documents were created which dealt with the cost to construct the project. (G 127, G 12-128, 196, 230, 231 and App 162). Not all were testified too. According to Mr. Quayle, the cost of the project continued to be fluid, even up to the time of the termination. (Tr. 7-11, p.86.) Mr. Quayle had been in the construction business since 1960 and in real estate development since 1970. He had managed residential dwellings, apartments, office buildings, warehouses and a printing plant and had experience managing all aspects of construction (App 68, para. 2.)

119. Appellant elicited testimony as to its anticipated construction costs by use of several exhibits. The primary exhibit Appellant addressed at the hearing was App 162, which set out in one column, the value number used by Rigby, and in the next column what Omni described as its estimated costs. G 127 was a cost list which totaled \$1,730,000. In comparing that figure to the \$2.7 million value, given the project by the Rigby appraisal, Mr. Quayle explained that the difference was essentially a wholesale/retail relationship, or as he preferred to describe it as value versus out-of-pocket costs. The \$1.73 million represented Omni's maximum out-of-pocket costs, while the \$2.7 or \$2.8 million represented the value of the completed building. (Tr. 7-11, pp. 83-84, 89-90.) App 161 had similar data, but also set out in a separate column the numbers used by Rigby, or as Mr. Quayle explained, the value of the building. There Mr. Quayle pointed out that the \$1.7 million was a constantly changing number, but he had left it at that figure (for purposes of the loans) as of January 1997 (Tr. 7-11, pp. 85-86.) App 162, misidentified in Mr. Quayle's testimony, at Tr. 7-11, p. 89, was essentially the same as App 161, however, some of the out-of-pocket numbers had been adjusted downward. It was showing a cost of \$1.5 million (Tr. 7-11, p. 90). Exhibits G 230-231 reflected another set of numbers and were identified as being prepared around the time of the hearing, using various proposal numbers and other adjustments. The documents were essentially identical and showed a value of \$2,703,839 and expected costs of \$1,683,715.89. (Tr. 7-11, p. 279.) The various cost documents were all projections; as the work was never done. Moreover, while the reductions reflected subcontractor numbers, Omni generally had no binding contract with any subcontractor.

120. Mr. Quayle reconciled the out-of-pocket column on App 162, with quotes Omni had received from potential subcontractors. According to App 162, the Appellant's direct out-of-pocket costs would have been \$1,204,280. It was reached by excluding overhead (OH) from the costs of \$1,499,558.87.

121. Mr. Quayle was challenged as to why he would not have made these adjustments for Equitable, if the construction costs would have been so much lower than the \$2.7 million shown by Rigby. He stated that even though the costs to construct went to \$1.5 million, Omni would not have gone back to the bank, because Omni did not want to be changing the loan application up or down. Counsel then asked if Mr. Quayle understood that he would have to be providing an additional \$250,000 to \$300,000 of owner's equity. Mr. Quayle stated that Omni was reducing the costs not by a cash outlay, but by either doing additional work themselves or getting a bid down. (Tr. 7-11, pp. 90-91.)

122. In looking at items on App 162, there were a number of significant differences between the numbers provided to Rigby and what Omni claimed were its expected costs. Omni originally showed \$16,500 for masonry, but that figure was eliminated because Omni decided it could do the masonry work using a stucco treatment that looked like brick. (Tr. 7-11, p. 88.) What is not explained, however, is why there was no increase in stucco (Tr. 7-11, p. 88). The costs for communication lines were also dramatically reduced. That cost had been set at \$64,160, but reduced to \$200 on the estimated cost. Omni originally included a data system, however, the FS was putting in their own wiring for the data lines and all Omni was having to do was put an X on the stub and then nail an electrical box, costing \$.19. While Omni eliminated the costs of having to install a data system, Omni retained the \$64,000 in value, since the lines were being placed in the building, albeit by the FS. (Tr. 7-11, pp. 91-2.) Also, Omni reduced the building permit cost from \$13,000 to \$3,725. For the first number, Omni costed the permit as if the building would have been constructed in Spanish Fork. The cost at Richfield, however, was much less. (Tr. 7-11, pp. 92-3; App 162, 300.)

123. Another item that changed in Omni's favor was excavation and grading. As of June 1997, Omni had only limited site work left to complete. Most of the site was at grade and ready for the start of footings. (Tr. 7-11, p. 82.) Mr. Foster, the grading contractor, said that rough grading was probably 70 to 80% complete, and Omni had excavated for the footing pad on the west side of the building, which was probably 20 to 25 % of the excavation for the footings. (Tr. 7-8, p. 187.) After the site work was completed, he was going to do underground utility work, as far as the sewer and water connections, and also the final grade on the parking area. Also, he was going to complete the curb, gutter and sidewalk. (Tr. 7-8, p. 188.) Omni initially had \$16,000 for excavation on App 162, but reduced it to \$500 because all but a small part of grade and some footings remained. (Tr. 7-11, pp. 94-95). Similarly, the original grading number of \$30,460 was revised to \$10,728, which was the anticipated cost of the work that remained. (Tr. 7-11, pp. 94-96; App 301)

124. As of the date of hearing, Ron Foster, the grading subcontractor, had not been fully compensated. He testified that he had a sweat equity interest of 2 to 3%. (Tr. 7-8, p.185.) He also had not been paid for trailer rental of \$3,498.54 (Tr. 7-8, p.195-96; G 156). Mr. Foster stated that while he had an equity interest, he was expecting to get his hard costs out and stated that it was possible that Mr. Quayle owed him between \$14,000 and \$15,000. He would do part for something in the future, but could not do it all for free, because there were certain costs he had to pay. (Tr. 7-8, pp. 197-98.) He described his current interest in Omni as being reimbursed for hard costs, and if there is additional money available, a percentage (Tr. 7-8, pp. 197, 199-200). G 158 is a bill dated April 10, 1998, and shows \$7,990.28 owed to Mr. Foster. In addition to site work, electrical value versus costs also dropped considerably, from \$133,000 to \$87,250. (App 162). A large part of that was due to taking out the cost for the paging system, which had originally been bid on the basis that the system would go into individual rooms. Mr. Quayle pointed out that Section 9.47 (AF 97) called for a paging system in the hallways and not throughout the building. Omni's electrical costs were also reduced when the lights in the parking lot were eliminated (\$11,350) and also the transformer and fire alarm (\$10,100) were modified. (Tr. 7-11, pp. 109-113, 300, 309.)

125. The record provided very little in terms of alternative costs or a serious challenge to the Appellant's reductions, which were reflected in App 162. The owner of Bergman Heating testified that if work was done in the winter, he would have increased the price by about 10%, because of less hours to work, identifying the costs because his employees would not put out as much and his trucking costs could be higher. (Tr. 7-9, p. 75.) Later though, he said that if he was signing a contract in July, additional costs for labor would not have been added, although there may have been material increases (Tr. 7-9, p. 92). Another vendor, Ashton, provider of the T Bar acoustical ceiling, indicated that he would have likely added 10 to 15 % to his bid (Tr. 7-9, p. 149). Finally, Peterson Plumbing said that he did not see much inflation and thought he could probably do job for same price now (Tr. 7-9, p. 113).

126. In most instances, the "real cost" figures on App 162 conformed with proposals that had been provided to Appellant. For example the "real costs" for footings, foundations, and flat work reflected the proposal from Winkle. (App 302.) However, Mr. Quayle explained that the cost would actually have been somewhat lower due to pricing he had worked out with Mr. Foster (Tr. 7-11, p. 98). Some items, however, did not conform and had no backup. For example, there was no backup for the waterproofing change from \$1,700 to \$250 on App 162, nor an explanation as to the hardware and appliances reductions that came to \$9,980 and \$4,000 respectively. Similarly, there was no explanation for the drop in the railing costs from \$14,200 to \$2,200. (Tr. 7-11, p. 134.) Among, other unexplained items were the foundation plaster, which went from \$3,200 to \$200, and the cleanup reduction, which went from \$10,200 to \$5,100 (Tr. 7-11, pp. 143, 150). In general, however, the costs Omni relied on to arrive at a cost to construct generally supported the \$1.5 million figure, before sweat equity. Sweat equity was the explanation for the drop in painting from \$36,000 from A.J. Quality Paint, to \$6,000. Mr. Quayle testified that he and his son were going to do the painting, thus accounting for not continuing to include that number. The \$6,200 listed under painting was for the material. (Tr. 7-11, p. 119.) Similarly, App 162 included no cost item for overhead. In the figure presented to Rigby, Appellant had shown \$350,000 for a combined profit and overhead number. (G 196, 230.)

127. Mr. Johnson was questioned as to value versus cost. He acknowledged that if the value of plumbing was \$70,000, but the contractor could get it done for \$40,000, then the \$40,000 would be the appropriate cost number. Similarly, if on the open market management costs are \$20,000 a year, but the contractor can do it for \$5,000, then the \$5,000 would be the appropriate number. (Tr. 7-2, pp. 271-72.) Mr. Johnson also agreed that an atypical investor would be someone who has the ability to use their expertise. To that extent, Omni would be atypical. (Tr. 7-2, pp. 274-75.) Mr. Johnson also acknowledged that generally a party does not borrow more than he has to lay out if he can help it. (Tr. 7-2, p. 311.) Finally, although Mr. Johnson continued to assert that the cost to the contractor beyond the loan would have been \$934,000 (rounded), when it came time for him to deduct an out-of-pocket sum, he reduced the above to \$460,000 (G 61).

DAMAGES

128. Appellant has claimed \$162,883 for lost rental income during the 10-year fixed lease with the FS, as well as \$2,030,183 for the loss of reversionary value of the building. After that, the lease

would have expired. The FS denies liability, but says if the termination was wrongful, Appellant is still not entitled to compensation, because Appellant would have had a negative cash flow on income from rentals over the life of the 10-year lease. The FS further contends that damages for the loss of reversionary value should be denied as unforeseeable. Moreover, even if the damages were foreseeable, the FS claims that the reversionary value (before adjustment for present day value) would have been considerably less than claimed by Appellant, and at most \$1,304,403. After discounting for present day value to December 1997, the sum would have dropped to \$384,000. That amount would have been further reduced by deducting the remaining principal payment, as well as deducting out-of-pocket costs and sweat equity costs needed to construct the building. According to the FS, had the lease gone forward, it would have been a losing proposition for Omni.

129. The parties provided evidence as to lost income and reversionary value damages. That evidence included a 2002 Rigby appraisal (which had been prepared at the request of Appellant's counsel) and expert reports and testimony from Darrell Oyer, for Appellant, and Kelly Johnson, for FS. Larry and Chad Rigby also testified. The Rigby 2002 appraisal assumed the hypothetical condition that the building was built and the lease with the government to occupy space within the building was not voided on June 17, 1997. (Tr. 7-7, p. 7-10; G 196.) As noted earlier, both Rigbys were well versed in conducting appraisals and testified as experts on the valuation of the property. Mr. Johnson was a certified public accountant, who at the time of the hearing, had 13 years of experience in calculating damages and in performing business evaluations. He had prepared hundreds of economic loss calculations and a significant amount of those involved commercial real estate. (Tr. 7-3, pp. 21, 32-33.) Mr. Oyer was a CPA. Prior to forming his own firm in 1991, he was a partner with Deloitte and Touche for 9 years. Before that he served for nearly 20 years with the Defense Contract Audit Agency. (G 200.) He acknowledged that prior to this case, he had never calculated the reversionary value of a building (Tr. 7-10, pp. 211-12). He also testified that he did not have experience in calculating damages in cases involving commercial real estate (Tr. 7-10, p. 190).

130. The 2002 appraisal addressed three principal categories. One was the market value of the property, in its leased fee estate, as of December 1997. That value had also been appraised in 1997. It is not particularly relevant to the dispute now before us. As had been the case in 1997, Rigby selected in the 2002 appraisal, the income approach as the appropriate method for determining that market value of the property. In this 2002 appraisal, Rigby valued the property at \$2,300,000, a somewhat lesser figure than 1997. That valuation was due to adjustments in the underlying data. Larry Rigby defined a leased fee estate as an estate where the value is predicated upon the lease in place, with full reliance on the contract lease, as well as reliance upon the reversionary value of the building. (G 96.)

131. The \$2,300,000 market value of the leased fee estate was comprised of two components: (1) the value of the anticipated 10 years of income from the government lease (income from December 1997 through December 2007); and (2) the value of the building at the end of that lease (Tr. 7-7, pp. 10-11, G 196). Mr. Johnson amplified the operation of the two components. He explained that when one is looking at the market value in 1997 of \$2,300,000 for the leased fee estate, one is combining the reversionary value of the income stream over the life of the 10-year lease with the reversionary

value of the building. These represent two separate cost centers. The income is the net cash flow to be made in holding the property for 10 years and the reversionary value of the building is the value one can receive after the lease, if one sells the building. (Tr. 7-3, p. 24.)

132. The 2002 appraisal also addressed two other two principal calculations, and these, unlike the 1997 market value, are germane to the damages claimed by Omni in this appeal. Those calculations were: (1) a discounted cash flow analysis which considered the annual income and expenses over the 10-year lease with the lease in place and (2) a calculation of the reversionary value of the property at the end of the 10-year lease (December 2007), which the appraisal then calculated to present day value as of December 1997. Neither of these matters was addressed in the 1997 appraisal. (Tr. 7-7, p. 11, 80; G 196 .) Omni claims damages in this appeal for those items.

133. The discounted cash flow analysis addressed income and expenses for each of the 10 years of the anticipated lease. Had the lease not been terminated, Omni would have had the right to whatever positive cash flow was created by virtue of the 10-year lease. The Rigbys prepared a worksheet titled "discounted cash flow analysis." The sheet showed the income and expenses for each year starting in 1998 and ending in 2007. The worksheet then calculated an anticipated revenue and companion expenses for each year. In addition, for certain years, the Rigbys included expenses for lease commissions and tenant improvements. The worksheet then totaled the income, and deducted expenses, to arrive at a cash flow and a projected NOI for 1997 to 2007. The document and Rigby's calculations, however, did not address debt service or show any deduction for that as an expense. (G 196.) As we address below, the parties did not disagree that debt needed to be deducted as an expense.

134. In general, the parties agreed as to the income and expense numbers on the Rigby worksheets, including the estimated vacancy rate that was used to determine the market income for rent during the 10-year lease (1997-2007). The FS rent, which comprised of the bulk of the space, was fixed. The market rent was not. Mr. Johnson testified that he relied upon Rigby for the operating expenses, tenant improvements and leasing fees, noting that Rigby was the expert in the area of appraisals and dealt with such matters all the time. (Tr. 7-3, p. 59, 67-68.) Generally, Mr. Oyer accepted the Rigby numbers, however, he clearly disagreed with Rigby's inclusion of management fees as an expense. He took the position that since management was going to be provided by Mr. Quayle, and Omni was not going to have to lay out money for the service, it should not be counted as an expense. (G 200.)

135. Management fees are typical expenses associated with servicing a building and lease (G 61, 196). Larry Rigby included a figure for management fees as part of the expenses. He stated that he had to address everything (including expenses), as would a typical investor. He said that a typical investor would purchase this property and either pay himself a management fee or pay a management firm to manage the property. If a bank were lending on the property, even though the owner would say he was managing it himself, the bank would include management costs. If the bank had to take the property back on a foreclosure, they would have to hire someone to manage the property, while they disposed of it or operated it. He called management fee a standard deduction for the expense column. In arriving at a management fee, he used 5%, stating that the industry standard is between 4

and 6%. He stated that even if Omni had asked, he would not have excluded management fees from his calculations. If management fees were not included as an expense, then, in Mr. Rigby's opinion, his discounted cash flow analysis would not be appropriate. To be appropriate, a discounted cash flow analysis must include a management fee as an expense. (Tr. 7-7, pp. 64-69).

136. Mr. Johnson similarly concluded that management fees under a lease needed to be included as an expense and not as a cost free requirement. That would not change, even if Omni was going to provide the service at no charge. He explained that it is very clear that lenders will not lend without considering management fees, because there is a substantial risk to them if the owners provide the management themselves. Lenders have to have room in the cash flow analysis to cover management fees going into the future. Second, there is no such thing as free labor or free expenses. Someone is going to be managing the building and getting a payroll check. There are also going to be costs such as telephone, insurance, equipment expense, after-hour answering service and automobile. (Tr. 7-3, pp. 62-64.) He also pointed out that prior to the termination, Omni showed management fees as an expense on several documents, including its cash flows. (Tr. 7-3, p. 89; G 120, 132, 135-136, 139, 141-142.) Finally, Mr. Freil of Bank One testified that management fees would be considered an expense, because if there was foreclosure, the lender would have to pay a manager to run the property for them (Tr. 7-7, p. 132). The Rigby total for NOI (cash flow) over the life of the lease, with management fees as an expense but not a deduction for debt, ranged from a low of \$204,792 in 1998 to \$254,706 in 2006 (G 196). Management fees over that period ranged from \$15,385 in 1998 to \$17,201 in 2006. The total deduction for management over the 10-year life of the lease was \$167,624. (G 196.)

137. Mr. Oyer set out his calculation of the value of cash flow from the rental operations in Enclosure F of his report. There he identified: (1) Rental Income, \$3,352,508; (2) Expenses, \$702,171; (3) Net Income, \$2,650,337; (4) Tenant Improvements, \$16,760; (5) Leasing Commissions, \$29,655; (6) Net Cash Flow, \$162,833. Although there were some minor differences in his underlying numbers as compared to the figures used by Rigby, the differences were not significant, except as to the treatment of management fees. Mr. Oyer did not include management fees as part of the expenses, and thus his expense figure was lower for the 10-year period and his NOI was higher. (G 200, App 57.) The FS pointed out that although Mr. Oyer had removed management fees as an expense in his final report (G 200), he had shown management fees as an expense in his original report (G 199). He did not remove management fees until he received an e-mail from counsel for Omni, which indicated management fees should be removed as an expense because Omni would not be providing any cash outlay for this activity (Tr. 7-10, p. 240; G 220). Additionally, the FS pointed out that Omni had not been consistent in terms of its treatment of management fees, and had included the fees as an expense in various documents prior to the termination (Tr. 7-11, p. 298; G 120, 132, 135-36, 139, 141-42).

138. Despite the differences in the NOI total, the parties agreed that the NOI, be it Rigby's or Mr. Oyer's, was subject to a further deduction for the expense of the debt service payments (G 61, G 199, 200). Mr. Johnson calculated the debt service for each year and deducted it from the income. He used annual debt service payments for an 11-year loan with an 8.55% interest rate, using Equitable Life and Casualty Documents (Tr. 7-3, p. 68; G 61, Schedule A). Mr. Oyer did not take exception to the debt numbers used by Mr. Johnson, and each party reflected debt deduction for each year of

\$244,104 (G 61, 200). While the above reflects payment for each of the 10 years of the lease, the actual term used to arrive at \$244,104 was an 11-year term. Thus, the final year of payment is not reflected here, but is dealt with later when we address reversionary value. Larry Rigby agreed with Mr. Johnson's numbers as to the appropriate debt reduction. He explained why he did not take debt as an expense in his appraisal. He pointed out that the appraisal process stops before the reduction of debt. It is the net income before recapture. He explained that he just appraises the building and associated project, along with the lease amount. He said debt is a variable and appraisers do not get involved in it unless it is a consultation problem or evaluation problem for another interest, other than fair market value. (Tr. 7-7, p. 23.)

139. When Mr. Johnson deducted debt service as an additional expense, the result was a negative cash flow of \$2,903 over the 10-year term of the Government lease. Using the Rigby numbers, he came up with a negative cash flow of \$4,744. The difference between those numbers is not material and resulted from differences in rounding and other calculations. More important, under either approach, Omni showed a negative cash flow over the 10-year term. (Tr. 7-3, pp. 35, 77-8; G 61, 196.)

140. Reversionary value was Omni's second component of damages. Larry Rigby testified that reversionary value is the price that the building would sell for at a particular point in the future, less the cost to sell the building. That would represent net proceeds. (Tr. 7-7, pp. 12-13.) In this case, the sum is what a purchaser would pay in 1997 for the right to own the building starting in 2007, after the lease had run. An investor would be purchasing, knowing that he would not get benefits for the first 10 years of rental because that cash flow was going to Omni. Mr. Johnson described the reversionary interest by example. He stated that when Omni would have gotten out to December 2007, the 10-year lease would be up and Omni would have a building that they own. The reversionary value, or interest, is the value of that building at that time, which is driven by all of the income and expenses for the period going on forever (forward), as long as the building is in existence. (Tr. 7-3, p. 124.) Larry Rigby stated that typically if a property is a commercial property or an income producing property, the income approach is the most effective method to calculate the reversionary interest (Tr. 7-7, p. 18). One use of the income approach involves capitalization of the rental income from the following year, and then appropriate capitalization to divide the gross value of the building. Then, one would deduct the costs of the sale. (Tr. 7-7, pp. 12-14.) That testimony is consistent with language in the Rigby 2002 appraisal. (G 196). Mr. Johnson agreed with Rigby that the income approach was the appropriate method. In his view, it was the only proper approach for valuation. He stated he considered an alternative, such as the cost approach, to be irrelevant in this particular application. (Tr. 7-3, pp. 131-32.). In general, he agreed with the methods and conclusions reflected in the 2002 Rigby appraisal and recognized that there were two areas of potential loss, of which reversionary value was one. He also agreed with Rigby that the loss of reversionary value had to be calculated to December 31, 1997, when the building would have been completed. (Tr. 7-3, pp. 43-45, 127-128; G 61.)

141. Chad Rigby testified that he also considered the income approach to typically be the most reliable indicator of calculating reversionary value, where there is a lease in place. He said that in a retail building, the motivation of a buyer is to anticipate rental income and somewhere down the road

a reversionary proceed from the property. That is distinguished from someone buying a residence, who wants the feel of living in the home and is not expecting to receive income. The approaches, other than income, do not consider that investor motivation of anticipating rental income from the property. (Tr. 7-10, pp.117, 119.)

142. Larry Rigby was asked if he knew of any standards or guides supporting the use of the income approach in the evaluation of reversionary interest for this type of property. He testified that the appraisal institute, which has uniform standards of appraisal practice, would suggest that the income approach be used here. (Tr. 7-7, p. 20). While he would not say that the use of the cost approach was inappropriate in evaluating value of the leased fee estate, he said that while it could be included for informational purposes (he would assign very little weight to it), he would consider it to be inappropriate as the primary amount that would evaluate the leased fee estate. He stated that he had run a cost approach, but it was not given much weight due to the leased nature of the property. He stated it does not matter how much the building costs to build, as long as it is leased, that is what you value the property at. (Tr. 7-7, pp. 20-21.) Regarding how he would calculate the cost approach, he stated that had he used that approach, he would have looked at the construction cost breakdown from the contractor. He pointed out that in Mr. Oyer's evaluation (using a cost approach), Mr. Oyer used national cost figures. Mr. Rigby said that one could compile the two sources together (national numbers and the contractor's actual cost breakdown) to come up with the cost approach estimate. It is noteworthy that Mr. Oyer, in his cost approach, did not use the actual cost contemplated by Omni (which was in the range of \$1.7 million), but instead used the value figures of approximately \$2.3 million. Had he used Omni's projected costs, his number, even under the cost approach would have been less than what he showed in his report. (Tr. 7-7, p. 119; G 200.)

143. Chad Rigby, referencing the final Rigby appraisal, pointed out that the report at page 50 identified two ways of using the income approach to come up with value. The report addressed the direct capitalization approach and discounted cash flow analysis. The direct capitalization approach is a one-step process. It considers a stabilized NOI calculation and it is then capitalized at a market derived capitalization rate. It considers the actual rent in place and projected rent for the market space in a stabilized condition. The rent is used to form a gross income estimate, which is then reduced by vacancy to show an effective gross income calculation. Appropriate expenses on a stabilized basis are then deducted from the effective gross income to show a NOI for the property. The NOI is then capitalized at a market derived capitalization rate to estimate the market value of the subject, as of the effective date of the appraisal. Under this approach, you end up with a single valuation number which attempts to take into account the cash flow and reversion. (Tr. 7-10, p. 121; G 196.)

144. In contrast to the direct capitalization method, the discounted cash flow method (also called yield capitalization and the method used here by Rigby) explicitly considers annual cash flows and then a reversion at the end. This comes up with two distinct numbers, as opposed to the direct capitalization approach which comes up with one number. With the discounted cash flow analysis, you project how cash flows from rent and expenses through a certain projection period. It takes into account rent in place, as well as the anticipated absorption time for market leased space. At the end of the projection period, you calculate an anticipated reversion and the discounted cash flows and reverse those sums to present value by way of an appropriate yield. Rigby, as shown in the

Reconciliation, stated that the discounted cash flow analysis or yield capitalization method of the income approach was the most accurate valuation method in estimating the value of the subject in its leased fee estate. For purposes of addressing loss of value, Rigby calculated the reversionary value of the building as of December 2007 by using the yield capitalization or discounting cash flow method or model.

145. In its 2002 appraisal, Rigby addressed the calculation of a reversion by considering two separate scenarios, titled Scenario One and Scenario Two. The first scenario valued the cash flow and reversion at \$1,970,000. It assumed the building would be vacated by the government at the end of the 10- year lease and would then revert to market. The second valued the cash flow and reversion at \$2,550,000. That scenario assumed the government continued to lease through the two option periods. The appraisal stated, "Both calculations are considered with a probability analysis performed by the appraisers to determine the appropriate reversion of the subject as of the effective date of the appraisal." (G 196.) Rigby chose Scenario One as the most likely. It needs to be noted here that the FS had no contractual obligation to exercise options after the 10-year lease. Since continuation of the lease was discretionary on the part of the FS, non-renewal was a risk assumed by Appellant when it entered into the lease. (AF 49-50; G 196).

146. In calculating the reversionary value for property at the end of the initial term under Scenario One, Rigby projected rental rates of \$12.19 a square foot for the main and upper levels (the bulk of the space) and \$11.58 a square foot for the lower level space. The result was a potential yearly income of \$410,640. That sum was then reduced by a 35% projected vacancy. The appraisal thereafter assumed a stabilized occupancy rate of 65%. That lowered the effective gross income to \$266,916. From that, Rigby deducted anticipated expenses of \$101,732, which yielded a NOI of \$165,184. Rigby capitalized that sum at 11%. From that, the appraisal deducted \$72,000 as "operating deficit." The \$72,000 is not the same as the 35% vacancy rate projection, but rather, the appraisal says the figure is used to show the "lease up time" to bring the building to the stabilized occupancy of 65%. That figure takes into account the point in time after the lease expires and after the building reverts to market. It takes into account absorption time, operating costs and other factors associated with rent up to a stabilized occupancy. The net value arrived at by Rigby was \$1,429,672. The appraisal recognized that some of the numbers, such as absorption time, were subjective. Deductions for commissions and tenant improvements were then taken from that number. (G 196.) The final figure was \$1,304,403. While Mr. Johnson asserted that Omni should have no recovery, because of weaknesses in its financial package and his view that its costs to construct would exceed any recovery, he did agree that to the extent a reversionary interest was to be calculated, it had been done properly by Rigby up to that point, subject, however, to the deduction for remaining debt service. (G 61.)

147. For purposes of this decision, we do not go through the calculation under Scenario Two. The data is set out in the appraisal. Rigby did not consider Scenario Two to be the preferred approach and Appellant has not challenged Rigby's choice between Scenario One and Two, nor has it provided any evidence as to why we should not accept Rigby's preferred choice. We thus focus on the approach Rigby recommended. Further, it is not disputed that the lease did not require renewal after the first

10 years. Scenario One is consistent with that condition while Scenario Two assumes the renewal options would have been exercised. (G 196.)

148. Mr. Oyer also calculated the reversionary value of the building. He chose to use an approach based on the costs to construct the building. He started with the 2002 Rigby appraisal value of \$2.3 million as the benchmark value of the property in 1997. (Tr. 7-10, p. 151; G 200.) He deducted from that figure depreciation of \$592,430 (\$59,243 per year), but then included an escalation of \$656,250 for the building value, which he based on the Turner Construction Index, an index he said was commonly accepted in the construction industry. He came up with a composite number of 4.26% which relied on indexed numbers for 1998 to 2001 and estimated numbers for the other six years. From his data, he concluded that the estimated value of the building on December 31, 2007 was \$2,450,076. (G 200.) At the hearing, he acknowledged that the above figure was subject to further adjustments, specifically, tenant improvements of \$68,082; the final year of debt service of \$208,368; and sales commission of \$57,187 and an adjustment in his escalation. These adjustments reduced his reversionary value to \$1,673,000. (Tr. 7-10, pp. 156-57, G 200.) While Mr. Oyer chose to use the cost approach to get a value in 2007, because he considered it more appropriate, he also provided somewhat contradictory statements as to the use of the income approach. At one point he said that he thought the income approach could also be used, even though he considered his choice more appropriate. (Tr. 7-10, p. 160.) However, at another point he said that he considered the methodology and processes used by Mr. Johnson and the Rigbys to be inappropriate in determining the reversionary value of the building as of 2007. (Tr. 7-10, p. 220).

149. A significant segment of Mr. Johnson's testimony involved a critique of Mr. Oyer's report. Much of his critique involved matters already discussed or items which Mr. Oyer agreed should be adjusted. For example, Mr. Oyer did not contest that the remaining principle payment needed to be deducted nor did he challenge leasing commissions. (Tr. 7-10, pp. 156-57.) There were, however, some other matters Mr. Johnson addressed that bear further comment. Mr. Johnson pointed out that Mr. Oyer's cost approach took the appraised value as of December 31, 1997, which Rigby established at \$2.3 million, and inflated that out to 2007 to \$2,450,000. Mr. Johnson pointed out that the \$2.3 million value (Rigby's 1997 market value) included, in addition to the reversionary value, the cash flow for the 10-year lease, which for purposes of damages, is a separate number. Thus, Mr. Oyer's use of \$2.3 million reflects a greater base value than the building would have in 2007, when an owner would be purchasing an asset with no guaranteed lease income. (Tr. 7-3, pp. 163-65.) In Omni's claim, Omni presented separate dollar claims for the cash flow and the reversionary value. The \$2.3 million, however, that he used as a basis was both. Mr. Johnson also challenged Mr. Oyer's conclusion that assumed the construction index was an appropriate measure of growth in building value using the cost approach, rather than the income approach. Mr. Johnson said that the growth rate generated by construction index is not consistent with the 2% growth rate applied to rents. He testified that Mr. Oyer replaces the appraiser's judgment of future building value with his own judgment, pointing out that Mr. Oyer calculated a fixed amount of depreciation based upon the appraised value. The changing market value of the property over time provides a more reasonable basis for determining annual economic depreciation. Finally, Mr. Oyer used 39 years as the useful life of the building, based on tax depreciation methods. According to Mr. Johnson, IRS depreciation guidelines are not necessarily meant to accurately represent economic depreciation and do not in this

situation. Mr. Johnson pointed out that as a CPA, he was familiar with IRS depreciation schedules, but those schedules were never intended to be used for determination of economic depreciation in an actual real estate appraisal. (Tr. 7-3, pp. 169-71; G 61.)

150. Larry Rigby also testified as to the Oyer report. He stated that he had never seen anyone use methods similar to those used by Mr. Oyer for determining the value of reversionary interest. He did not consider what Mr. Oyer did to be an appropriate methodology for determining the reversionary value of the leased fee estate in this case. (Tr. 7-7, p. 40) Mr. Rigby was familiar with the cost approach and had used it on many occasions. However, he pointed out that seldom, if ever, is the cost approach used to get a reversionary value or reversion value in commercial real estate business. (Tr. 7-7, pp. 41-2.) He did not believe Mr. Oyer's report was consistent with appraisal factors, nor did he believe that it was consistent with professional standards and guidelines governing evaluation of a building (Tr. 7-7, p. 41). He believed that real estate appraisers are the appropriate persons to determine the fair market value of real estate and that the IRS depreciation guidelines are not appropriate in calculating the market value of the reversionary interest in this case (Tr. 7-7, p. 45). This was the first time he had ever seen anyone use IRS guidelines in determining depreciation and valuing the reversionary interest (Tr. 7-7, p. 46).

151. At the bottom of the 2002 appraisal sheet, titled Discounted Cash Flow Analysis, Richfield Government Building, where Rigby set out the data for the 10-year cash flow, Rigby also set out a series of other numbers. These are essentially summaries which identify the various values as to the claimed damages. The first listing was titled Reversion and had the following items.

Gross Proceeds- end of 2007	\$1,429,672
Less: commissions @ 4%	57,187
Tenant Improvements	<u>68,082</u>
	\$ 1,304,403

(G 196.)

152. The above items refer back to the calculation in Scenario One. The \$1,304,403 is the sum, after the identified expense deductions that an investor would have been willing to pay for the right to own the building as of 2007, based on the revenue and expense assumptions set out in Scenario One. That assumed non-renewal of the lease, after the initial 10- year run. (G 196.) It needs to be reiterated that this is the reversionary value as of December 31, 2007. The numbers here are not discounted. Further, that sum is calculated without deducting debt service. Debt service is dealt with in addressing cash flow and not reversionary value.

153. The worksheet had a second listing under the above. It was titled Discounted Value. Under it were the following:

Present value of cash flows	\$ 1,584,693
Present value of reversion	<u>\$ 384,262</u>

Discounted value	\$ 1,968,955
Rounded	\$ 1,970,000

The rounded sum is the combination of the cash flows for the 10-year lease period brought back to a present day value as of 1997 (\$1,584,693); and the sale value of the property in 2007, also brought back to the present day value as of December 1997 (\$384,262). None of these numbers reflect the debt service payments that would have had to be paid over the life of the lease, plus one year or one payment. The process of discounting and how the above numbers were calculated is discussed in more detail below. Mr. Johnson accepted Rigby's calculation of the net value of the reversionary interest. After adjustment for the remaining debt, the net reversionary value was \$1,097,955. Mr. Johnson, as noted below, also calculated the present value of the reversion to December 31, 1997. That figure was \$323,445, and took into account the deduction of the remaining debt payments. (Tr. 7-3, pp. 132-33; G 61, 196.)

PRESENT VALUE

154. All parties agreed that the reversionary value and the cash flow should be subject to a present value calculation. Present value takes damages to be earned in the future and values them at the present. The concept measures the amount of money at a current date that is the equivalent of a future cash payment. (G- 200.) One achieves present value by discounting the future sum. According to the Rigbys and Mr. Johnson, sums are generally discounted for time and risk. (Tr. 7-3, p. 112, Tr. 7-7, p. 25.) Mr. Johnson stated that at a particular point in time you look at all of the cash flows that would occur in the future. In order to bring those into one amount you have to take future amounts and bring them to a common date in order to establish the cumulative value. He did acknowledge that when one uses that concept, then a re-judging of interest would also come into play. (Tr. 7-3, p. 45.) For example, if December 31, 1997 is period zero and one goes out five years, assuming for each of those years that you would earn \$100 for a total of \$500 over the five years, you cannot simply add the \$100's together to get damages of \$500. That is because having \$100 in your pocket five years from now is not the same as having it now. So what is done is that one goes out to each of the periods and brings them back at an interest rate, or discount rate, to the present value date. He continued, saying \$100 in the future, depending on the interest rate, may be worth \$90 now. That is because you can take \$90 now and invest it and have \$100 by the end of year one. (Tr. 7-3, p. 94.) Put another way, if someone is sitting in December 1997, what would they be willing to pay for the right to own a building as of December 2007. He said that sum would be \$323,000. He said they would lay out of their pocket \$323,000 and realize that they would not get anything for the first 10 years because that is considered elsewhere in the calculation. In deciding what to pay they would also have to consider risk factors, the biggest risk being who will be the tenants after the 10-year period. (Tr. 7-3, pp. 99-101, 135-36.)

155. Mr. Oyer explained present value in the following way. He said the assumption is that if the person receiving the money obtains it now, rather than later, interest could be earned on that "advance" payment. He stated that the present value concept measures the amount of money at a current date that is the equivalent of a future cash payment. He then set out the formula for

calculating present value, which is future payment (here the net cash flow) divided by the quantity one, plus the interest rate raised to the power representing the time period. Mr. Oyer set out the following formula in his report for determining the present value of future payments. The formula is $PV = 1000 / (1.05)^2$, or $1000/1.1025$ or 907.03. (G 200.)

156. Larry Rigby explained when one would or would not discount for present value. He stated that one would not adjust for present value if someone asked them to calculate what a property would be worth at a particular time in the future and if they were looking to sell the property at that future point in time. In contrast, one would adjust for present value, if the property were used for lending purposes or anything else that one would address as an investor, where one would be interested in saying how much would I or should I pay for this property today, so it would be worth that much at some future period of time. (Tr. 7-7, pp. 86-7.) He stated, in explaining how to derive present value, that the value in the future is discounted to the present value, which would be the number that someone could invest that much money, into a typical investment, to arrive at a final figure at the end of the projection period. Key to his statement is that someone is arriving at the rate by looking at the rate for the same or a typical class of investment. (Tr. 7-7, p. 15.)

157. While both parties agreed that a future sum needed to be discounted to present value, they differed markedly as to two elements of the calculation. They differed on the rate to be used and whether the rate should reflect solely time or instead reflect time and risk. They also differed as to the date to which one would discount. Mr. Oyer contended that the calculation of present value in this case should not consider a significant discount for risk. He considered it appropriate to use a discount rate of 4.92%, which was based on the treasury bond rate. He stated that the bond rate reflects a substantially, but not entirely risk-free investment. (Tr. 7-10, p. 227.) He also concluded that the discount should be taken back to the date of judgment for both the cash flow and for the reversionary interest. (Tr. 7-10, pp. 229-30.) The FS, relying on the Rigbys and Mr. Johnson, concluded that the discount rate needed to reflect both risk and time. Further, the FS concluded, based on those individuals, that for the reversionary value, the discount needed to be taken back to the date of the breach or December 1997. The FS did not address the date for discounting the cash flow, since the FS concluded that would be a negative number.

158. Mr. Oyer justified his position as to no risk by explaining that his rate differed from that of the FS in that he was solely discounting damages. He stated that he did not use a discount rate to evaluate any real estate, as did the FS. Rather, he used his rate to determine that if Omni was to get \$2 million plus in 2007, what would Omni have to be given today in order to get that figure. His discount rate does not factor in risks of the project. He used his rate to determine the result if the plaintiff got \$2,000,000 plus in 2007, what would he have to be given today in order to get that sum. (Tr. 7-10, pp. 228-34.)

159. Mr. Oyer said he chose a discount rate of 4.9% because the objective here was no longer to evaluate a real estate deal. He said that "Omni is either going to get zero or some value out here. If that value is \$2,400,000 and it is 2007, then what would be an equitable amount to give Omni now so that when Omni gets out in 2007, it can have the same amount of money." He then queried what can

Omni invest in? He said he chose a relatively safe return of 4.92 % treasury rate. He said that getting a 13% investment (the rate used by the FS and Rigby) would be difficult (Tr. 7-10, p. 161). 160. Mr. Oyer distinguished how he saw his task from what was done in the Rigby report. He understood the Rigby report to give an evaluation of the building as of December 31, 1997. He said that he looked at two time frames: (1) value on December 31, 1997; and (2) the present value as of the date of his report, (April 2002). He said that notwithstanding the FS contention to the contrary, the date he would use would be the date of the judgment. (Tr. 7-10, p. 151.) Mr. Oyer concluded in his report that the value of lost rental income from January 1, 1998 to December 31, 2007 was \$145,624 as of March 31, 2002 (consisting of \$45,128 for the income and interest from January 1, 1998 to March 31, 2002 and \$100,496 present value for the income after March 31, 2002) and (2) the present (reversionary) value of the building as of March 31, 2002 was \$1,904,029. (G 200.) March 2002 was the date of his report and that is why he chose to calculate to that date, implicitly recognizing that the calculation would change based on the actual time of judgment (G 200).

161. As noted earlier, once at the hearing, Mr. Oyer adjusted his starting number for the reversionary value to \$1,673,000, by deducting the additional debt payment, as well as tenant improvements and commissions. He also acknowledged a slight error in his escalation index (Tr. 7-10, p. 156). The calculation from his report would thus have to be rerun for present value, even using his discount rate and taking it to the date of judgment, as he contended.

162. Mr. Johnson and the Rigbys looked at the matter of a present value calculation very differently from Mr. Oyer. Larry Rigby testified that to reach a present value, one is taking a value in the future and moving it by discounting the value, using an appropriate discount rate, to the present. He said, "The discount rate addresses the present value of the income stream and also the reversionary value of the building. That value in the future is discounted to the present value so that you derive it at present value which would be the number that someone could invest that much money into that typical investment to arrive at that sum at the end of the projection period." (Tr. 7-7, pp. 14-15.) Mr. Johnson defined present value in the context of economic loss analysis. He said that at some point in time, you look at all of the cash flows that would occur in the future. He then continued, noting, however, in order to bring those all into one amount, you have to take future amounts and bring them to a common date in order to establish the cumulative value. (Tr. 7-3, p. 45.) In order to put those numbers into one lump sum, it is not fair to just add up the totals for the years, because a dollar received at some period in the future is not worth the same as a dollar received today. So present value takes amounts you receive in the future and brings them back to the present at a relevant discount rate to come up with what the future loss is worth at a set date (Tr. 7-3, pp. 45, 91-92).

163. Mr. Johnson explained that a discount rate applied to the present value calculation must reflect the risks associated with the project. An appropriate discount rate must have, as its foundation, yields available on competing investments. He addressed the need to have rates reflect risks in the marketplace in the context of discounting a cash flow. That, however, would also apply to discounting the reversion. He stated that this case deals with a real estate project, so to bring cash flows to the present, any prudent investor investing in real estate would demand an interest rate that is comparable with the risks associated with real estate. (Tr. 7-3, pp. 95, 112.) He then

turned to how the rate, once determined, is applied. He stated that he took the debt balance that remains as of 2007 and applied the discount rate to it. He used a present value discount rate of 13% (being 0.2946), and then subtracted the discounted dollars for debt from the Rigby number, so as to recognize that a buyer would have to satisfy that debt in some manner (or Appellant would have to pay it off), thus reducing what Appellant could get for the property. That debt figure would reduce the 1997 reversionary value of the property by \$61,389.21 (using present value for \$208,000 of remaining debt), which when applied to the Rigby number of \$384,000, would leave a final number of \$286,872 for the reversionary value.

164. Here, Mr. Johnson saw two areas of potential losses. The first loss of cash flow during the 10-year lease period and then at the end of the 10-year lease, the loss of the reversionary interest in 2007. In explaining the latter he said, at the end of the 10-year period in December 2007, there is the issue of the building still being there, available for Omni to have and enjoy its future benefits. Mr. Johnson considered it appropriate to calculate the losses as of December 31, 1997, explaining that it was the date or point in time when the building would have been completed and occupied, i.e., the point at which Omni would have had value. (Tr. 7-3, pp. 43-44.)

RATES

165. Both Rigby and Mr. Johnson concluded that over the 10-year lease, Appellant would have had a negative cash flow of from \$2,000 to approximately \$4,000. Mr. Oyer stated otherwise. Bringing the cash flow back to present value would be a different calculation and raise different issues than those involved in discounting the reversionary value. Cash flow would be different because income flow is incremental for each of the 10 years. How one calculates income flow, such as that here, if positive, is to discount only as to the years not yet achieved. The only other issue separating the parties as to cash flow discounting involved the proper rate to be used. Rigby used an 8 ½% discount for the income stream, because that reflected risk. It was lower than the rate used for the reversionary value because the income stream was largely guaranteed by the government lease, while in contrast, the 13% Rigby used with the reversionary value of the building reflected the fact that an investor would be purchasing an asset which would not be available to it for income until 2007. Even then there was no certainty as to rentals. As Mr. Rigby explained, a typical investor would cap the risk and discount the building value higher because the investor does not know what is going to happen. (Tr. 7-7, p. 35.) Mr. Johnson also agreed that a lower rate should apply to the cash flow, as opposed to reversionary value, and he too relied on the presence of the government lease. He, however, would have used 9½%. (Tr. 7-2, pp. 99, 102.)

166. Returning to the reversionary value, Mr. Rigby and Mr. Johnson explained why they used a discount rate of 13%. Larry Rigby considered 13% to be appropriate because it addressed the alternate investments that someone could invest their money in, as well as the risks associated with owning a piece of real estate. He pointed out that the appropriate discount rate applied to real estate in a market like Richfield would be anywhere from 14 to 16% for a standard commercial building. (Tr. 7-7, p. 25.) Under questioning from the Board, he stated that 13% would be in the middle of the range within two points in either direction. Risk-free would be in the 5% range and in his view got into bond rates. He saw the rate used by Mr. Oyer to be essentially risk-free. He used 13%, rather

than a higher figure like 15%, by taking into account the possibility that the FS might choose to renew. (Tr. 7-7, pp. 87-88.) Additionally, the 13% rate reflects risks, such as risks of management, uncertainty as to the term of the lease after the 2007 initial term and maintenance. Mr. Rigby did not see this as a risk-free investment. (Tr. 7-7, p. 26.)

167. Mr. Johnson also used 13% for the reversionary interest (Tr. 7-3, p. 35). He cited loss of lease on several FS properties after the first 10 years. He pointed out that in bringing cash flows back to a real estate project, a prudent investor in real estate is going to demand an interest rate that is comparable with the risks associated with real estate. (Tr. 7-3, p. 95.) He made the point that as an investor or owner of this property, he knows he can walk to the bank and get 2 to 3% on a savings account. He said, "I would want more to invest in a real estate project because there are many things that can go wrong with a real estate project." (Tr. 7-2, p. 97.) Putting the above in layman terms, he explained that if one was an investor and invested \$385,000 today at 13% interest at the end of the year 2007 you would have a value of \$1,304,403. The 13% addresses alternate investments that someone could invest their money in as well as the risks of owning a piece of real estate. The quality of the tenant is a large part for the 13%. Approximately 25% of the building was to be local market. (Tr. 7-3, pp. 17, 25, 33-35.)

168. In addition to relying on his experience and that of the Rigbys, Mr. Johnson also supported his position as to the need to include risk in the discounting, by referring to the Board to Uniform Standards of Professional Appraisal Practice (2002 Edition) (G 56). This document lays out the standards, methods and approaches that should be used to come up with the value of real estate (Tr. 7-3, p. 103). At paragraph 4 on page 85, he pointed out a section dealing with discount rates. In pertinent part it says, "Considerations used in the selection of rates are risk, inflation, and real rate of return." (G 56.)

169. Mr. Johnson opined that he thought the treasury rate was not appropriate nor did it have anything to do with a real estate. Mr. Johnson described it as inappropriate that Mr. Oyer was applying a risk-free discount rate to an investment that was not risk free. He stated he was not valuing the loss of return on a 5-year government bond, but rather, a loss associated with a commercial real estate project. (Tr. 7-3, pp. 112-13.) He stated that Mr. Oyer's rate was not consistent with the equity rates of return on real property, which are typically in the 10% to 15% range. He found application of Mr. Oyer's discount rate to result in an overstatement of calculated damages. (G 61.) He testified that he had never seen a rate such as the one used by Mr. Oyer. (Tr. 7-3, pp. 113-14.)

170. In addition to addressing damages, Mr. Johnson also provided testimony as to the debt coverage ratio normally used in commercial lending. He addressed it in relation to his premise that Omni's financial package did not show a sufficiently adequate return so as to justify a lender providing money on the project. He stated that generally, lenders want debt coverage ratio of 1.1 to 1.35. According to his calculations, over the life of the project, it came in at 1, or slightly less than 1, because the cash flow was negative. Debt service coverage is defined as a company's ability to meet its debt obligations, including interest and principal payments. (Tr. 7-3, p. 69.) Notwithstanding the above, it is undisputed that Mr. Pitcher recommended the loan and the loan committee for Equitable

approved it. Additionally, and while the FS does contest this matter, Mr. Hancey stated that MIC was prepared to furnish the loan but for the termination.

171. In its brief, and during the hearing, the FS cited the Board to the fact that several notices of lien were recorded against Omni for non-payment of work on the fire center (AF 181-82). The lease COR had received some calls from subcontractors which claimed not to be paid on the fire center. (AF 181-82, 223-25.) The CO, however, did not cite this in her decision, nor did she do any analysis of the reasons for the disputes over the liens. Moreover, at the hearing, Omni presented evidence of payment and satisfaction of these debts. (Tr. 7-11 pp. 156-59; App 68, para. 78; App 144-47, 155-57.)

DISCUSSION

This appeal concerns the FS termination of Appellant's lease for failure to make progress endangering performance. In addition, the FS has identified some alternative arguments. To the extent they merit discussion, we address them later.

The principle question before us is whether the CO was reasonable in determining, at the time she terminated, that there was no reasonable likelihood that Omni could provide a completed building by December 31, 1997. The appeal raises the question of how long the government must wait and to what degree of jeopardy must it expose itself, before it can properly terminate a contractor that still has time remaining, but which time the government decides is insufficient to complete the work.

Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987) provides a clear legal test for a case of this nature. It holds that a CO may terminate for failure to make progress, if the CO can show that at the time of the CO's action, the CO was reasonable in concluding that there was no reasonable likelihood that the contractor could complete by the stated completion date. A CO does not have to prove that it was impossible for the contractor to perform on time. The test focuses on reasonable likelihood, not impossibility. Further, as the court said in McDonnell Douglas Corp. v. United States, 323 F.3d 1006 (Fed. Cir. 2003), the CO's reasonable belief as to likelihood (at the time of the termination) can only be based upon facts known at that time, regardless of facts which surface later. As the court pointed out, a consideration of post-termination factors or events would transform the reasonable belief requirement into a demand that the CO have perfect foresight. Focusing on what was known, or should have been known, however, cuts both ways. In deciding entitlement, we do not look in this case at the matters that were not considered or known by the CO (whether those matters would support or undermine her decision at the time) at the time she made her determination to terminate. We recognize that there are instances when one will consider matters not looked at by the CO. That is when the non-considered matter is shown to be an independent basis for termination. See Kelso v. Kirk Bros. Mech. Contractors, Inc., 16 F. 3d 1173 (Fed. Cir. 1994) and Joseph Morton Co., Inc. v. United States, 757 F. 2d 1273 (Fed. Cir. 1985). This appeal, however, involves facts that do not meet the standard set out in the above cases. While the FS has presented considerable evidence as to what it characterizes as weaknesses in the Appellant's financial package and weaknesses in its organization, most of that evidence was simply not known or considered by the CO. Moreover, it is not the type of information which would serve as an independent basis for default.

Accordingly, our concentration is on the issues addressed by the CO in her final decision and whether her decision meets the Lisbon test.

The CO's decision terminating the lease addressed three principal matters: (1) Omni did not have a financing approval; (2) it had not closed on the land; and, (3) it did not yet have a building permit from the City. In the CO's view, the status of these matters made the timely completion unlikely (FF 90.) Each of these matters had been subject of postponements and earlier fruitless promises of completion by Omni to the FS. (FF 38, 44, 47, 60, 62, 73.) The CO had legitimate concerns, however, having legitimate concerns is not the test for justifying a termination. Had that been the standard, we might well have sustained the default. But the law requires that we assess whether there was no reasonable likelihood of completion. That is a significantly more stringent test.

As of June 10, 1997, the date of the cure notice, considerable time had passed since the initial award of the lease in November 1996. As of June 10, Omni had essentially completed the design and had conducted significant site work at the location planned for the building. Most tasks crucial to the start of construction, however, remained to be completed, the most important being Omni had not yet secured construction financing; had not closed on the land; and had not received final approval of the building plans and issuance of the building permit. (FF 24, 75, 81.)

Soon after award, Omni, with the FS approval, began to deal with BLM in an attempt to have BLM join as a tenant. These dealings lasted through January 1997 and delayed the design, as well as financing. In part because of the BLM delay, the FS and Omni agreed that the Appellant would begin its physical work on the fire center without simultaneously starting the supervisor's building, even though the initial award contemplated Omni building the fire center and supervisor's building at the same time. (FF 21, 25.) By the actions of the Appellant and FS, it was clear that the June 1997 completion date, which had been set out in the awarded solicitation for completion of the fire station and supervisor's building, was not going to be enforced and had expired (FF 52, 58).

In late February 1997, the FS began to question Omni regarding plans for securing financing on the supervisor's building. Thereafter, Omni made a number of representations to the FS as to anticipated progress. Each time the represented progress was not achieved. (FF 38, 40, 47, 58, 60.)

On April 25, 1997, the FS and Omni entered into a lease agreement, SF-2 (which carried a date of April 14). This agreement replaced the original agreement awarded to Omni. The SF-2 stated at Item 6, "The following are attached and made a part hereof:" Among the six listed items was the Solicitation for Offers #R4-95-22 that had been issued in November 1995. (AF 49.) Selected provisions of that solicitation have been set out in FF 2-11. Just as the FS had done with the original award, the lease signed on April 25, 1997 (SF-2), similarly contained no provision requiring a particular start date for construction. The April 25, 1997 SF-2 did, however, set a due date for the finish of the supervisor's building, setting it as December 31, 1997, which was curiously described as "tentative." (FF 58-59, 62.)

In addition to having no required start date, the new lease did not set out new interim dates. The April 1996 award had some interim deadlines, which called for providing a commitment for

financing, submission of a construction schedule, and showing ownership of the land for the building. Those time frames, however, were all specifically tied into to the award date, and at the time Omni signed the SF-2, those time frames had long ago closed and had never been enforced. Given the lack of enforcement and the failure in the SF-2 to specifically address interim deadlines tied into the December 31, 1997 completion date, it is clear to us that the only mandatory date of significance in the new agreement was that newly established completion date. Any attempt to conclude that Omni and the FS believed that the new agreement required Omni to provide information within 15 days of some unknown trigger, is simply unreasonable. Furthermore, the interpretation put forth by the FS was not how either Omni nor the FS treated the SF-2, once it was signed..

Reasonable interpretation of the SF-2 agreement mandates that the time set out for submissions after award was not effective in the new agreement. If the FS intended to give Omni a deadline to complete interim tasks, it had to do that directly in the SF-2. It did not. We find the FS argument that the no waiver clause somehow resurrected the provisions, tying submissions into the award date, to be unconvincing and inconsistent with contract interpretation principles and inconsistent with how the parties treated the agreement. This is not a case about enforcing the original award. On April 25, the parties entered into a succeeding agreement. That agreement is what controls and we must apply it reasonably and consistent with evidence of its logical meaning and the parties' intentions and their actions. (FF 3-6, 59-62.)

We also note that while the FS and Appellant engaged in conversations in March and April 1997 over FS concerns about Omni's lack of progress, in none of those conversations did the FS claim that Omni was obligated to meet the time frames in the solicitation for the interim tasks or face termination. It was not until approximately May 9, 1997 (which also coincided with Ms. Hinricks taking over as the CO), after the signing of the SF-2, that the FS began to refer back to the solicitation provisions, set new deadlines and threaten adverse action. (FF 40, 58-62, 64.) When the parties signed the SF-2 they had discussed anticipated time frames for providing proof of a financing commitment and completing other matters. They also discussed, and obviously also agreed to, a finish date. The Appellant made various verbal representations as to supplying interim confirmations, but none of those representations were reduced to writing or set as binding agreements. The FS could have negotiated interim dates in the April SF-2, but it did not. The FS cannot circumvent that omission by attempting to reconstruct interim dates. The propriety of the termination turns on the issue of endangerment and not on a failure to meet milestones, since none were contractually required. (FF 58-62.)

Since the endangerment issue is tied to final completion and occupancy, we need to determine how much time Omni had remaining for performance at the time of the termination and how much time it needed to complete the remaining work. Only then can we assess whether the CO was reasonable in finding that there was no reasonable likelihood of completion by the due date of December 31, 1997. When the SF-2 was signed, Omni had approximately eight months to complete. As of the termination on June 18, Omni had 192 days remaining. (FF 59-62, 106.)

Prior to signing the SF-2, Omni had represented several times the length of time it would need to complete the construction of the supervisor's building. Notes of a May 8, 1996, meeting, 6 months

before award, show that Appellant told the FS that it anticipated needing 150 to 180 days to construct the supervisor's building. At the time of award, in April 1996, the completion date was still set as November 1, 1996. The period from award to December 31, 1997, was 6 months and as of April 1996, the plans had not even been started. (FF 18, 44.) At no time, prior to the termination, did the FS express objections to the estimated time frame for construction set out by Omni. At no time did the FS suggest those times were inaccurate or unobtainable. Omni was never asked by the FS, even after the FS received the May 12, 1997 schedule, to rework the schedule. The FS did not represent that it had concerns that Omni did not allow enough time for work, or that Omni did not have the capability to complete the structure in the time remaining. (FF 66-67.)

On May 12, 1997, the Appellant provided the CO with a rudimentary schedule that showed 180 days for construction. The schedule specifically stated that it was subject to acceleration "if the recording date of the loan shifted." This schedule was in line with Appellant's earlier representations to the FS. The schedule counted back from December 31, 1997 and showed consecutive durations for six general activities. The schedule did not address whether certain activities had to be fully completed before the start of the next activity, however, it is evident that while some items may have served as a constraint on following work, most tasks and activities would have allowed overlap (stacking of trades). In addition, a substantial segment of the site work (shown on the schedule under item A, site work (15 days)) had already been completed by May 12. (FF 24, 108, 123-24.)

If one counts the 180 days on the schedule backwards from December 31, 1997, that calculates to a July 5 start. The FS wants us to find that unless the work could be started by that date, the CO was reasonable in concluding that there was no reasonable likelihood that Omni would meet the due date of December 31. Any fair and logical reading of the schedule, however, shows that the July 5 date was not the latest that Omni could proceed and still meet the December 31 deadline. The FS, in relying on the July 5 date, ignores that significant site work had been completed and ignores the wording in the submitted schedule as to acceleration. The FS, furthermore, ignores the notice given by Mr. Steadman to the CO in his conversations with her just prior to termination, that Omni had a built-in cushion of 30 days in its schedule. The FS reading also ignores the earlier references by Omni as to completing in 150 days and ignores the fact that until the dispute, no-one questioned that number. The FS appears to read the 180-day schedule as if each prior activity is a constraint on the next one. That is not logically the case. (FF 67, 108.)

The standard needed to justify a termination is that there is no reasonable likelihood that the contractor could complete by the due date. Here, the evidence leads us to conclude that the Appellant could have started the remaining construction considerably later than July 5, 1997, and still likely have met the due date. Moreover, Omni put the CO on notice as to that possibility and did so prior to the termination. (FF 67, 85-89.) We find that taking into account the status of the site work already completed, the inclusion of some cushion in the schedule, the logical overlap of activities on the schedule and finally the ability to accelerate, it was simply not reasonable for the CO to have concluded that Omni could not finish by December 31. We further find that Omni could have started as late as August 4 (which would have given slightly more than 150 days), and still had time to complete. In reaching our conclusion as to the time needed to construct and to start, we have considered the evidence provided by the FS through Mr. Allan, Mr. Moffett and Mr. Winkle. Their

testimony does not convince us that Omni could not finish in 150 days or less, with acceleration. Additionally, we find no convincing basis to support the argument that Omni would have needed 8 to 10 months to complete construction. We note that Mr. Moffett candidly conceded that an organized contractor could finish in 6 months and there is no indication that he was even addressing acceleration. (FF 88, 107, 125.) When Mr. Winkle was asked about time, he hedged on the matter, noting that he could not say the work could not be completed in time (FF 108). Against that backdrop, we look at the simple facts that the Appellant had been consistent in claiming it could finish in 150 to 180 days without acceleration and the FS had not objected. Omni had already completed portions of the construction work and it indicated a willingness to accelerate if necessary. Further, while we recognize that Omni did not have signed contracts with various subcontractors, it had gotten prices and verified scope with them and thus was not starting from scratch. The FS argument that we should find against Omni because the subcontracts were not signed shows a lack of understanding of the prime/subcontract process. Further, the overall indication from those subcontractors who testified was that they could perform if the job had gone through. (FF 18, 44, 122-26.)

Having established that Omni could have started as late as August 1, we now turn to the remaining issues as to endangerment. Those are: (1) was there no reasonable likelihood that Appellant could have secured financing in order to begin the remaining construction by August 4 or some earlier date; (2) was there no reasonable likelihood that Omni could not close on the property to meet that date; and, (3) was there no reasonable likelihood Omni would secure a building permit in time to complete.

The most important and most contested of the above items was the securing of financing. Much of the information as to the status of the financing and the information available to the CO, as of the date of the termination, is generally agreed to by both parties. At the time of the termination, the CO correctly understood that the Appellant did not have financing in place, nor approved. (FF 90.) While Appellant introduced evidence at the hearing of a financing arrangement with MIC, whose principal was Mr. Hancey, there is no evidence that the CO was given information as to that arrangement at the time of the termination (FF 102). Instead, she was being told at the time, by Omni and Mr. Pitcher of Equitable, that Equitable's loan committee was going to meet, that the loan committee was likely to approve the loan at that meeting and that the meeting would occur some time around June 20 (FF 81, 84-85, 89). Since the test is what the CO reasonably knew at the time of the termination and not what was later learned, the arrangements between Omni and MIC (which were not then conveyed to the CO) are not relevant as to the question of the propriety of her termination action. They are relevant as to FS challenges to damages, but that is addressed later. In assessing the reasonableness of the CO's conclusions as to financing, we look only to what was known at the time of the termination and that focuses on the status of the loan application with Equitable.

By early June 1997, the FS had reasons to question whether or not Omni would be able to secure financing. Omni had made a number of earlier representations to the CO as to its acquiring the financing from Equitable, but still had no financing approval. (FF 38-39, 44-46, 58, 60, 62, 63, 68, 73.) In early June, the FS was aware that prior to dealing with Equitable, Omni had dealt with at least one other potential lender (Bank One), which was no longer in the picture, but there is no

evidence that the FS was not privy to the details of that falling out (FF 41). Time was moving forward. Clearly, as of the date of the cure notice, Omni was not able to guarantee the FS or provide the FS with an approval document. Omni further advised the CO, in response to the cure notice, that it would not be able to provide those guarantees until approximately June 20. (FF 85-89.) Because of Omni's prior failures to provide commitments, and given that Omni could not provide the FS with any guarantee, the CO had reason to be concerned over whether Omni would be able to secure the needed loan or whether this would be another broken promise (FF 38-40, 44-46, 58, 60, 62-63, 68, 73). For that reason, if the only evidence given the CO as to Omni securing of the loan had been Mr. Quayle's representations in response to the cure notice, we might well have found that the CO was justified in terminating. In that instance we may have found that her lack of confidence in Mr. Quayle was so justified, that without more, she was reasonable in concluding that there was no reasonable likelihood that the loan would be secured and the building constructed by the due date. Put another way, Mr. Quayle, without some corroboration and absent surrounding circumstances indicating otherwise, had run out of capital in terms of convincing the FS. The facts however show, that in this case, Mr. Quayle was not the only source of information. Here the record shows reasonable corroboration as to his representations. (FF 73, 81, 84-89.)

Both immediately before and then just after receiving the termination notice, Omni told the CO that the loan with Equitable had moved forward and the approval was awaiting action by the loan committee for Equitable. The matter was waiting for the committee to get together, after an earlier postponement, that postponement not being caused by Omni. (FF 81, 84-87, 89.) The FS was aware that Mr. Pitcher was the individual handling the loan for Equitable. The FS had been in direct contact with Mr. Pitcher for several months. In May 1997, and more on point, on June 10, 1997, 2 days after the FS sent the cure notice, Mr. Pitcher engaged in conversations with the FS. On June 10, he spoke with Ms. Gilbert as to the status of the loan. In that conversation, he related to her that he was recommending the loan to the committee. Ms. Gilbert did not recollect him stating that the loan was for sure, and it does not appear that she made that detailed an inquiry. Even if she had, we find it doubtful that Mr. Pitcher would have told her the loan was guaranteed. That, of course, was why the loan was still subject to an approval by the committee. (FF 68, 71, 81.)

Mr. Pitcher, however, was clearly indicating that the loan was likely. Moreover, he had earlier represented to the FS that he was recommending the loan and that once the loan was approved, it could likely be closed within 2 weeks. (FF 68, 71.) The CO had no reason to disbelieve Mr. Pitcher's representations on June 10, which pointed at the loan likely being approved. Earlier, he had been candid with the FS in telling them that Mr. Quayle had not yet provided him with an appraisal. (FF 68.) There was no evidence to suggest that Mr. Pitcher was simply telling the FS what Mr. Quayle wanted them to hear. Using the June 20 loan committee date as an expected date for approval, or even using June 25, we find for a fact that on June 18, given the information before her, the CO was not reasonable in concluding that the loan would likely not be approved. Given the representations by Mr. Pitcher, as to both the loan approval and closing, and given the fact that Omni had ample cushion as to a start date (as late as August 4), the CO cannot justify refusing to wait at least several days to see the results of the loan committee.

If approval was on June 25, and we find that Omni needed 2 weeks for closing, that would have allowed closing by July 10. If the approval was earlier, then the date would have moved slightly forward. Given that Omni could have started as late as August 4, Omni had more than ample time to complete. Finally, we point out that the FS chose to call Mr. Pitcher as its witness at the hearing. There, he back-pedaled on a number of matters, specifically stating that he should not have recommended Omni's loan and suggesting longer durations for Equitable's final closing, after the approval. He even suggested that the loan may never have closed. The statements he made at the hearing conflict with his earlier affidavit statements, as well as representations he made during May and June 1997 to the FS. (FF 81, 98-101.) We find the positions and statements he made in his affidavits and in his actions during 1997 to be more credible than his hearing testimony. Moreover, the undisputed facts are that the matter did go to the loan committee, the committee approved the loan; however, Omni could not proceed further (with either Equitable or MIC), because the FS took the lease away when it terminated. (FF 97-98, 101.)

In addition to what the CO knew at the time of the termination, through Mr. Pitcher, the CO also spoke separately with Mr. Quayle and his attorney, Mr. Steadman, on June 17. In those conversations she was advised by them of the pending loan committee meeting. Mr. Steadman again spoke to her on June 18. He offered to provide any additional data; however, the CO related to him that the only data that would have been acceptable to her at that time was a firm commitment. (FF 86-89.) It is undisputed that Omni could not produce a firm commitment until the loan committee met. What she wanted was unobtainable. Also, the record shows that on June 18, prior to the termination, the CO had the letter from Mr. Pitcher, dated June 17, 1997, which set out in writing that the loan committee would be meeting on the loan. According to Mr. Quayle, the letter had been provided to the CO. (FF 84.) We recognize that the FS in its briefs contests some of the points made in Mr. Steadman's letter and testimony, specifically the FS asserts that Ms. Hinricks at all times was open to and encouraging submission of further information. Ms. Hinricks did not testify at the hearing, due to an on-going health matter. However, she had testified at a deposition made part of the record. We have read that deposition and her notes of the conversations and find Mr. Steadman's version more credible. It is clear to us, that as of June 17, the day before the termination, the FS had made up its mind. Unless Omni gave it firm proof of a commitment, the termination was going through.

Given the status of matters as of June 18, we therefore find that the FS cannot sustain the position that the CO was reasonable in concluding that Omni had no reasonable likelihood of securing the loan in time to start construction so as to complete by December 31, 1997. Rather, the evidence is to the contrary.

We now turn to the other two issues set out in the final decision. Those concern the ownership of the land and the securing of a building permit. The building permit was tied into completing the drawings to the satisfaction of the County. The evidence at the hearing, and in the record, was overwhelming that both the closing on the land and the securing of the building permit would have been completed well before the needed start date for construction. Once the financing had been approved, those matters would not have been a problem. The testimony from Mr. Hicks, Mr. Farnsworth and Ms. Ogden (none of whom had an interest in the outcome) made it clear that if Omni

had the lease it could have secured the building permit and closed on the land by early July. The evidence showed that the building plans, for all intents and purposes, were completed and satisfactory to the County. (FF 92-95.) The FS arguments, to the contrary, focus on technical aspects of the documents, but ignore the fact that these witnesses all supported Omni's conclusion that the permit and land closing would have been completed well before the deadline for Omni starting construction.

The fact that these matters could be quickly resolved was represented to the CO by Mr. Quayle and by Mr. Steadman in their conversations and Mr. Steadman's letter. If the CO considered those representations inadequate, she could have verified matters by a minimal inquiry to the City and County, to assure that what was being said by Mr. Quayle and Mr. Steadman was indeed accurate. Had the CO done that or taken up Mr. Steadman's offer to provide her more data, she would have known that these were not issues on which to base a termination. (FF 84-89.)

In addition to the above, the FS attempted to justify the termination by contending that Omni's performance on the fire center caused reasonable uncertainty as to its ability to perform so as to justify the CO terminating. The record shows that the FS expressed some dissatisfaction with Omni's performance on the fire center building, claiming at the hearing that the work on the fire center was plagued with deficiencies both in its construction and management. (FF 43, 60, 76- 77.) That said, however, the FS elevates the problems well beyond their impact. We find that the problems identified by the FS were not such that they established that Omni lacked the skill to do the work or lacked the focus to finish. The fact is that at the time of the termination, the fire center had been completed and it had been occupied for over a month. The FS had never taken an action to terminate, nor had it put Omni on notice that its past activity on the fire center was jeopardizing the continuation of the supervisor's building. There were disagreements over several specification matters, but nothing that rises to a level that would justify termination of the supervisor's building. Even Ms. Lippire described the items on the punch list as minor. (FF 52-54, 60.) Although the fire center was smaller and less complicated than the supervisor's building, Mr. Quayle of Omni was not new to construction. While Mr. Quayle had not previously constructed a building of the size of the supervisor's building, he had constructed smaller structures using the same general techniques that were to be used here. Moreover, others involved with the building, Mr. Rounds, Mr. Anderson and Mr. Peterson all had extensive experience in development of structures of a comparable, albeit not exact, nature. (FF 117.) The testimony of Mr. Allan and Mr. Moffett (while sincere in terms of dissatisfaction with the fire center operation) appears to be a stretch in terms of trying to justify the termination on this basis (FF 54).

A look back at the situation at the time of Omni's termination shows that despite no time frame having been set out in the SF-2, the CO set a specific deadline for Omni to have its firm commitment for financing and for the closing of the land and securing of the building permit. Because Omni did not meet the CO due dates and because of the history of the project to that point, the CO concluded that the termination was justified. (FF 89-91.) The CO, however, had not realistically looked at the time needed to construct or when Omni could start (FF 107). Instead, the CO grasped the July 5 date in the last schedule provided by Omni and read it as if it was set in stone. The CO, at some point, had a right to set some deadlines. This lease had not been moving forward. However, in setting deadlines, she needed to be mindful that the dates she set out and the response were tied to the completion date of December 31, 1997. She did not do that. The fact that she set a date does not

make that date binding for purposes of termination where it is shown, as here, that meeting that date was not crucial for completing on time. As the court pointed out Empire Energy Management Systems, Inc. v. Roche, Secretary of the Air Force, (March 24, 2004), citing McDonnell Douglas Corp. v. United States, *supra*, “a default cannot be declared simply because the contractor has failed to meet an interim milestone.” The default provision “require[s] reasonable belief on the part of the contracting officer that there was no reasonable likelihood that the contractor could perform the entire contract within the time remaining for contract performance. . . .”

In order to default because of endangerment of performance, the FS here had to establish that as of June 18, 1997, because of what remained to be done, the CO was reasonable in finding that there was no reasonable likelihood that Omni could complete by December 31, 1997. The FS has failed to do that.

During the hearing, the FS presented considerable evidence which came to light after the termination and which the FS contended independently justified the termination. In particular, the FS argued that Omni would not have been able to complete by the due date because of weaknesses in its project financing and potential problems it would have incurred in meeting the requirements for finalizing a loan (even if it had received approval in a timely manner). (FF 49, 98-101, 103, 145.) Putting aside the merits of the FS conclusions, the record was clear that at the time of the termination, the CO did not use these items as a basis for her decision. While the CO had concerns as to financing, and in fact terminated because Omni did not have financing approval by the termination date, she had no knowledge that Equitable, the lender in play, had any problem with closing the loan once it was approved. There is no evidence she was aware of or considered matters such as the debt ratio. Because she had no knowledge of these matters, we do not give weight to nor spend time assessing for purposes of judging the validity of the default, the accuracy of Mr. Freil’s concerns as to the strength of Appellant’s proposal, the second thoughts expressed by Mr. Pitcher, or the contentions of Mr. Johnson that even had Omni gotten approval it could not have closed a loan. (FF 42, 48, 101, 172.) The views of Mr. Freil and Mr. Johnson are however, relevant for purposes of determining damages, because one of the primary elements of damages is a showing that Appellant would have suffered losses, and whether or not the Appellant could have completed the project would be germane to that issue.

Finally, an exchange during the CO deposition is very telling as to the basis of the default. There she acknowledged that had Mr. Quayle gotten the loan approval at any time during the cure period, it would have been “OK” (FF 90, 91). The point is that the default occurred because the financing was not in place. According to Mr. Pitcher the committee approved the loan either on June 20 or June 23. (FF 97.) The CO’s decision not to wait and to impose the termination was not justified.

ALTERNATE CONTRACT BREACH

The FS contends that Omni’s failure to provide proof of financing within 15 days of award justifies termination. The FS rests its conclusion upon the premise that the lease contained a no waiver clause providing that failure to enforce any contract provision shall not operate as a waiver. (FF 10.) The FS asserts that because of that clause, the Board should find no waiver of what the FS says is the

contract requirement to provide proof of financing, proof of a building permit and a construction schedule to the CO in the time specified. According to the FS it engaged in no pattern of forbearance as to these matters and it established deadlines for Appellant to satisfy these requirements with ample time to cure.

At the time the SF-2 was signed in April 1997, the submittal dates and deadlines, which had been tied into the April 1996 award date, had long closed. The SF-2 in April 1997 provided only one due date, that being the completion of December 31, 1997. As we stated in our ruling rejecting the FS motion for summary judgment in Omni Development Corporation, AGBCA Nos. 97-203-1, 98-182-1, 01-2 BCA ¶ 31,487, the provisions dealing with filing information were tied into the long expired award date and not into a date after execution of the lease. We pointed out that, at least some extent, it was illogical to conclude that in signing of the lease in late April 1997, the parties were incorporating a requirement that was almost a year overdue. At the time we stated, "to at least some extent it was illogical." The record had not been fully developed and we were addressing matters in a summary judgment context. Now having the full record, we can say with confidence that incorporating the requirements as claimed by the FS is truly illogical and not just to some extent.

In the April 1997 SF-2, the FS set out no language which can reasonably be construed to revive the already expired provisions as to submittals (AF 49). Additionally, the actions of the parties, after the SF-2 was signed, show that those provisions were not considered to be revived. For us to accept the FS contention that it had a right to terminate, because Appellant did not meet dates which were set for action in 1996, would have us interpret the contract in a manner contrary to that shown by the parties' actions and not reflected in the instrument. It would be unreasonable to read the new contract, the SF-2, as independently setting 15-day time constraints for submittals. (FF 58-62, 91.) The FS could have included interim dates of performance in the SF-2. Had Appellant signed and agreed to such provisions, then the times would have become binding. That did not happen.

The FS does not have a right to terminate because the Appellant missed a comfort date. It could terminate only if the Appellant had missed a critical date, which the FS could demonstrate endangered performance. We have found that the deadlines set by the FS in the cure notice did not meet the latter test. As of April 25, 1997, the date the FS signed and the lease became binding, the obligation of the parties as to the rights of the FS to terminate for endangering performance, essentially boiled down to the Appellant being able to complete on or about by December 31, 1997. Whether it met interim dates (unless such dates were specifically tied to performance) was not part of its agreement.

Finally, we need to comment on a recurrent theme in the FS defense. That theme has been that Omni did not have financing, nor the land, nor a building permit at the time of the termination and since those items were not in place, unless Omni can establish for a certainty that they would have been completed, the termination must stand. The FS misses the point. By terminating the contract, the FS made it impossible for Omni to establish to a certainty that various disputed items or tasks would have been completed. That condition is in part why the FS is bound to show no reasonable likelihood of completion and not simply show that the contractor was evidencing signs, even strong ones, that it might not be able to finish. To defeat the termination, Omni does not have to prove to a certainty

that it would have met all the loan contingencies in time to close on financing and start the project. Clearly, to defeat the default, Omni does not have to show that on June 18, 1997, it had the loan approved, the permit issued and the land closed. Whether those were completed or not is not the issue. The issue is whether Omni could have completed by December 31, 1997. For the FS to prevail, it must show that the CO was reasonable in concluding that there was no reasonable likelihood that Omni would have met the interim target dates, so as to complete by December 31. Based on our findings from the evidence, Omni did not have to complete those interim matters by June 18, in order to deliver a completed building to the FS on December 31, 1997.

CURE NOTICE

In their respective briefs, and at the hearing, the Appellant and FS raised a number of arguments about the cure notice and its delivery. We have identified the various contentions in the facts. (FF 76-80.) However, since we have found that the termination is not sustainable under Lisbon, we choose not to go into the myriad of legal issues presented by both parties as to cure and the effectiveness of the time of delivery of that notice.

ANTICIPATORY REPUDIATION

The FS revived the anticipatory repudiation argument we had earlier rejected when we denied a FS Motion for Summary Judgment in Omni Development Corporation, *supra*. The FS argues that the termination should be sustained because Omni failed to provide adequate assurances of its ability to fulfill the lease in response to what the FS described as the CO's reasonable request for assurances. The FS cited as authority, Danzig v. AEC, 224 F.3d 1333 (Fed. Cir. 2000).

The FS claims we should sustain the termination because Omni's response to the cure notice was insufficient in assuring the CO that construction would begin, let alone assuring that the work would be completed in a timely manner. Citing the telephone conversations and letter from Mr. Steadman, the FS claims that Omni admitted that it was unable to cure the specific items required by the CO during the cure period, was incapable of providing concrete assurance of a timely contract performance, and finally raised no legitimate explanations for its inadequate progress. (FF 86-89.) According to the FS, Danzig holds that under those circumstances, the government is entitled, as a matter of law, to consider Omni's response a repudiation of the contract. The FS then states that Danzig requires that the CO's decision be sustained, whether or not the standard set forth in Lisbon for termination for failure to make progress is met.

There are significant flaws in the FS arguments. The FS is correct that Omni acknowledged in responding to the cure notice that it could not cure some of the FS demands within the time demanded by the CO. However, the FS fails to give weight to the fact that Omni stated it would complete the items in issue and would do so by a date that would allow it to finish construction by the due date. The test for termination is not whether Omni could meet an interim demand, the test is whether it was unlikely that it would complete by the finish date set out in the contract. Here we have found that Omni could have completed the demanded matters after the dates set by the CO and still likely would have completed the construction on time.

There are limited circumstances where a contractor could be defaulted under Danzig, even though the contractor still had adequate time to complete. Meeting that requires the FS to show that the contractor was actually refusing to meet a critical performance objective. This was not a situation where Omni could have done what the FS asked, but simply refused. Instead, it was a situation where Omni was waiting on others to close out the matter and where Omni had provided the others with the information they needed. It is utterly unreasonable to suggest that Omni's statements could not provide the guarantee of financing or guarantee the other matters (as of June 18) can reasonably be stretched to suggest that it was unwilling or unable to provide these guarantees, even at a future date. In fact, Omni told the CO that the items would be completed, that it would not prevent construction by the due date, but Omni simply needed a little more time.

The fact is that Omni at all times evidenced its intention to complete the project. Mr. Quayle and Mr. Steadman responded by telephone with assurances of Omni's intention to complete and the imminent approval of the loan, approval of the building permit and closing of the land. Additionally, the CO knew that Mr. Pitcher was proceeding forward and if she really believed that Mr. Steadman was not being truthful, she could have easily verified Mr. Steadman's representations as to the land and permit by a simple telephone call to the City/County. (FF 86-89.)

The FS, however, wants us to find Appellant's response insufficient, because Omni could not meet the time deadlines set by the FS, even though the deadlines were not part of the contract and were not tied into the real performance times. The FS cannot create artificial deadlines and then terminate a contractor because it fails to meet those dates. Where, as here, the Government creates artificial after-the-fact deadlines (not set out in the contract) and the deadlines cannot be shown to be necessary to meet for the finish date, then a failure to meet those deadlines cannot be a sustainable basis for default under Danzig.

If Omni had represented to the FS that the best it could do was to secure financing by the middle of August and work could not start until late August or early September, then a default based on Danzig may have been justified. We reach that conclusion because there Omni would have been telling the FS that it could only meet certain dates and those dates would not allow it to meet the occupancy date in the lease. We do not have such a situation here. Clearly, Omni was not repudiating the contract or suggesting it would or could not perform by the completion date set by the parties in the SF-2. In fact, Omni was contending it could complete well within the prescribed contract period.

DAMAGES

Omni's claimed damages fall into two categories: (1) the loss of income from the lease during the firm 10-year term; and (2) the loss of reversionary interest in the property, after that lease had run. Omni says that had it completed the building by December 31, 1997 (the date anticipated for occupancy by both parties), the building would have generated income of \$162,833 over the 10-year lease and at the end of the lease (December 31, 2007), the building would have had a reversionary value to Omni of \$2,030,183. (FF 128.)

The FS asserts that even if the termination was a breach, Appellant suffered no monetary damages. It claims that Appellant's expenses would have exceeded its rental income and therefore it would have had a negative cash flow over the life of the lease. The FS contends that the second claimed set of damages, the loss of reversionary interest, is not payable, as such damage was not foreseeable. The FS argues that reversionary value damages are not appropriate for this contract, because the contract was for lease of space and not to build a building for the government. The FS also claims that any potential profits were speculative since Omni was a new business with no prior track record on buildings of this nature. The FS further asserted that due to the financial weakness of the project, Omni would not have been able to secure a loan, and therefore, would have been unable to construct the project, even had the termination not been exercised.

The FS relies on testimony from Mr. Freil of Bank One, Mr. Pitcher of Equitable and Mr. Johnson to support its contention that Omni would not have been able to secure a final loan, so as to construct the project. Mr. Freil testified that Bank One backed out of the financing because it felt that the financial package of Omni was weak. Mr. Johnson addressed ratio between debt and income and concluded that the ratio was below what lenders would normally accept. The testimony from Mr. Pitcher addressed the second thoughts he was having, 5 years later as to the loan. (FF. 82, 101, 172.) The testimony from Mr. Freil and Mr. Johnson supports the proposition that the loan was weak. The testimony from Mr. Pitcher, we do not find convincing. Taking, however, other evidence presented at the hearing, we find that the doubts raised by the FS do not convince us that Omni likely would not have closed the loan.

Omni put on evidence from Mr. Hancey of MIC where he stated that he and Mr. Quayle had come to an agreement over a loan and that MIC was prepared, as of June 19, 1997, to provide it, had the default not occurred. The testimony showed that MIC was essentially an alter ego of Mr. Hancey. Thus, he had broad latitude and could have acted quickly. When he was questioned by both Appellant and Government counsel, we found his explanations as to the specifics of the loan and the process he intended to follow to be both reasonable and believable. The FS has provided no credible evidence to establish otherwise. (FF 102-05.) In making our conclusion as to his credibility, we take into account that the June 25 agreement between MIC and Omni put Mr. Hancey in a position to benefit MIC, if the Board finds in favor of Omni. That agreement, however, was never hidden. That agreement does not, in our view, cause us to find Mr. Hancey's testimony unreliable. (FF 105.)

As an offshoot of its challenge to the MIC loan, the FS has contended that various conditions of the MIC loan were not completed. First, the FS again ignores the fact that the loan was not completed because the FS terminated. Once termination occurred, it did not make sense for MIC and Mr. Quayle to go further and consummate the loan. Additionally, as to the FS's contention that Omni would have been unable to provide MIC with the \$300,000 letter of credit set out as a requirement of the loan and the FS argument that Mr. Rounds, the co-guarantor, would have been unwilling to sign, the evidence is to the contrary. Mr. Anderson and Ms. Leishman made it clear that the letter of credit was no problem. Mr. Rounds testified that he was prepared to sign. (FF 102-104.) However, the project was terminated and consequently there was no reason for these individuals to go further. To the extent the FS relies on these arguments, the FS has failed to provide convincing proof in support of them.

As a final point on the FS attempt to claim Omni would not have been able to close the loan, we also find that even if MIC had not been available or had chosen to back out, it is likely that Omni could have proceeded in time with Equitable. Prior to the hearing, Mr. Pitcher had taken a strong position in favor of the loan and anticipated closing. In affidavits after the termination, he similarly took those positions. (FF 47, 71, 81, 97-98.) It was not until some time after termination that Mr. Pitcher met with Mr. Johnson for an interview session and that Mr. Pitcher began to express various reservations. It is of course possible that Mr. Johnson brought out prevailing doubts that had been lingering within Mr. Pitcher. It could also be otherwise. The fact is that we find Mr. Pitcher's actions prior to the termination and his statements in the initial affidavits far more credible than the tone of his testimony in July 2003. Even then, at the hearing, he acknowledged that Equitable would have done what it could to make the loan work. (FF 101.) On the basis of the evidence before us, we find that the FS has not established that Omni likely would not have gotten the loan. In fact, the evidence is otherwise.

The FS does not contest that Omni's claim for the loss of income from the 10-year lease would be a foreseeable damage. It does, however, contend that the claim for recovery of the reversionary value of the building at the end of the lease should not be considered a foreseeable damage in this case and therefore should be denied. Before dealing with the specific dollars, we address that issue. The FS says that it did not enter into a contract to facilitate the construction of a building by the Appellant. Rather, it entered into a contract to rent space for a specified period, and after that period, it had the option of being relieved of any further responsibility. As such, it contends that it should be liable for nothing more than lost rental, if provable. The FS continues, arguing that the only foreseeable damage for default that it accepted in executing the lease would be that the government would be obligated to pay the payments for the first 10-year term. Sun Cal Inc. v. United States, 25 Cl. Ct. 426 (1992). The FS says that it had contracted to pay rent for 10 years in the amount of \$25,151.27 per month and urges that we consider lost rent as the damages ceiling. According to the FS, if it is subject to damages for a loss of reversionary interest in a breach of lease situation, it would be illogical for the government to ever enter into an agreement that had a lessor providing a "build to suit" tenant facility. It says that, in effect, the United States would be potentially buying the building.

The Appellant sees matters otherwise. It states that foreseeability is an objective test based on what the breaching party had reason to foresee. Energy Capital Corp. v. United States, 302 F.3d 1314 (COFC 2002). It sets out the rule as to foreseeability as follows, "It does not require that the defendant should have had the resulting injury actually in contemplation or should have promised either impliedly or expressly to pay therefore in case of breach." Anchor Savings Bank FSB v. United States, 47 Fed. Cl. 396 (Fed. Cl. 2003).

No one disputes that the solicitation bid upon by Omni did not require construction of a new building. Omni could have offered to lease to the FS an existing building or, as Omni did, offer a new structure. Here, Omni decided to provide a new building and with that agreeing to build it subject to various FS specifications and requirements. The FS accepted Omni's offer.

There is nothing in the lease which either provides for or negates the recovery of reversionary value as a result of a breach. We, therefore, have to look outside of the specific contract language. In doing that we look to the basic law as to foreseeability. That basic law is what should a party entering into the agreement recognize as the potential damages from its breach. As we discuss below, both on the basis of our understanding of the law and on the basis of what are the damages understood in the commercial market place, we find the loss of reversionary value to be foreseeable. As Mr. Johnson acknowledged in his testimony, when he considered damages he was looking to put the party in the same position it would have been but for the non-performance.

We need to treat the parties as we would any other reasonable party in this type of commercial arrangement. In real estate leasing, a party who invests in a leased property expects to recover its money through two means. One is through cash flow and income and the other is through the ultimate ownership value of the property, the financing of which is being funded by the rents. This is not an esoteric concept; it is basic to any real estate investing. The concept was clearly understood by both Mr. Johnson and the Rigbys. (FF 140-147, 149-153.) Accordingly, in entering into the agreement with the FS, Omni was logically expecting its profits from both the rent and ultimate value of the property. The FS either knew or should have known that.

Throughout the hearing and in briefing, the FS has emphasized that this is a real estate matter and the damages are unique to real estate. The FS has emphasized that we are dealing with real estate valuations and in the real estate arena should give great weight to the Rigbys and Mr. Johnson over Mr. Oyer. The Appellant has tried to say the damages are generic and no longer a real estate matter. (FF 148-150, 158-163, 166-171.) The FS cannot pick and choose when it wants to recognize the real estate nature of the contract and breach and when it does not.

While the FS is not in the real estate business, in entering into this lease it entered the commercial marketplace. As such, it must be expected to operate in the manner of an educated party to transactions in which it engages. It can protect itself, by means of contract clauses, but otherwise it is held to normal commercial practice. As we pointed out at the outset, the FS has not addressed this matter in any lease clause.

When we look to what was foreseeable in the commercial marketplace, the evidence and law overwhelmingly dictate that the loss of reversionary value is a damage which should have been contemplated by a lessee, such as the FS. During the hearing and in its briefing, the FS relies heavily on the conclusions of Mr. Johnson and the Rigbys. They were clearly familiar with the concept and operation of reversionary value in a breach of lease situation, including its place in damage calculations. (FF 140-147, 149-153.) Their testimony supported the fact that the valuing of reversionary value was common and a part of leasing (FF 140-42, 145-47, 150). The fact that the FS drafters or managers of this contract may not have been familiar with the concept does not obviate its applicability.

The reversionary value of the property was the equity Omni would have owned at the end of the lease (FF 140). For us to ignore that the Appellant's return on this lease was to be in both the income from the lease and the equity that would follow, would require us to invalidate a logical and fully

transparent financial expectation, an expectation understood by Mr. Johnson and the Rigbys to not be uncommon in a real estate lease breach (FF 140-142, 146). Further, we point out that the FS addressed in its correspondence at the outset of the lease that the rental rates on the lease from Omni were particularly attractive. The FS knew, or had reason to know, that the rent it was being charged was below the market. (FF 17.) It would have been illogical for the FS to believe that Omni did not have its profit in the other aspect of the lease arrangement, i.e., the building that would be paid for by the rental income. It was implicit that there would have been profit and value in the building that Omni would have owned, essentially free and clear at the end of the lease. For the FS to ignore this fact and say that such damages were not foreseeable and should be limited solely to rent, in our view requires us to conclude that the FS was viewing the situation through tunnel vision.

In addition to the fact that the Mr. Johnson and the Rigbys established the operation of reversionary value as a damage in lease breach situations, reversionary value is also reflected as a damage in case law. In its brief, Appellant directs our attention to Strader v. Sunstates Corp., 129 N.C. App 562, 572; 500 S.E. 2d 752, 757 (1998). While we are not controlled by state court decisions, matters of lease valuation and breaches of leases are not uncommon at the state court level and thus reflect normal commercial practice. We can look to state court decisions for guidance. In Strader, the court stated that a lease “is a contract which contains both property rights and contract rights. Property rights include the right to receive unpaid rents and the reversionary right in the leasehold. Id. 192 N.C. App at 570; 500 S.E. 2d at 756-57.” In addressing the matter of reversionary interest, the court said, “the proper amount of damages is the present value of the rent for the remainder of the term and the present value of [the lessor’s] reversionary interest at the end of the term.” Similarly, the court in Boulevard Associates v. Sovereign Hotels, 861 F.Supp. 1132 (D. Conn. 1994) addressed the concept of value of the equity interest at the termination of a lease. In Re Taylor, 198 B.R. 142 (Bankr., D.S.C. 1996) the court addressed the value of a leased property. There the court noted that clearly a lease of real property creates an estate in land that vests in the lessor. The court then said, “A leasehold and a reversion are separate estates in the same property.” Miller v. Lemon Tree Inn of Roanoke Rapids, 32 N.C. App 524, 233 S.E. 2d 68 (1977). What is left in the lessor is the reversionary interest or remainder.” While these cases are not directly on point, they are significant because they further confirm that part of the value of a leasehold property is the value of equity at the end of the lease, as well as the ongoing cash flow.

We cannot leave this matter without also addressing the structure of the Omni financial arrangement and some of the surrounding circumstances of the FS/Omni lease. As will be addressed in more detail below, the lease expenses (if we include debt service) slightly exceeded the income Omni was to receive based on the rental rate, thereby creating a negative cash flow. However, Omni had a negative cash flow because a significant segment of its expenses was debt service. Through payment of that debt service, Omni would have been building equity in the building. (FF 139.) The FS seems to ignore that. While we see the calculation of damages as best handled by use of calculating the reversionary value and income calculations (as put forward by Rigby and Mr. Johnson), if we did not allow for recovery of the reversionary value, then we would have to provide some means of crediting Appellant for its debt payment costs. Because we follow the method laid out by the Rigbys and confirmed by Mr. Johnson, and calculate the damages by use of the reversionary value, we need not make such an alternative calculation.

Had the project been completed, Omni would have secured a return on its money through the return of equity due to its payment of debt service. Its ultimate return and profit was thus in the ownership of the building. When that value is added in, the lease was not a losing proposition as claimed by the FS. How profitable is a matter we address later. (FF 95-96, 101, 133-39, 140-41, 145-49.) The fact is that if we were to calculate the expenses, without giving Omni credit for the ownership value it was securing by the debt payments, we would be overstating the expenses in relation to the return. That is an erroneous approach. Rather, we look to the testimony and practices discussed by the Rigbys and Mr. Johnson, who implicitly recognized that one cannot accurately assess value without looking at both cash flow and the reversionary value.

In summary, the case law supports the proposition that reversionary value is a foreseeable damage in a lease breach of this nature. Additionally, both Mr. Johnson and the Rigbys, whom the Board has found to be knowledgeable and experts in matters of real estate evaluation, evidenced a familiarity with reversionary value as an element of damages in a loss due to breach of a lease. (FF 140-42, 146.)

In claiming a lack of entitlement to the reversionary value and lack of foreseeability, the FS relies upon L'Enfant Plaza Properties v. United States, 3 Cl. Ct. 582, 588 (COFC 1983). There, the lessee, in addition to seeking lost rental profits, also sought increased costs of construction and financing, which it claimed were due to delays in its being able to start construction of the building. The contractor characterized its increased costs as a "garden variety construction delay claim." The court found that increased costs were not payable and stated that the breach was not the breach of a contract to construct a building for the government. Instead, it was "a breach of a lease of real property for which there is an established measure of recovery for delay in vesting possession." The court continued, "Under the lease, L'Enfant agreed to construct improvements on the property and to maintain them in a manner which prevents a recurrence of slums and blight, but it was entitled to retain title to the improvements for the 99- year term of the Lease." It closed that "this was a contract to lease real property on which L'Enfant would construct a building for its own use. The court then limited liability to the lost rent. The FS equates Omni's claim here with L'Enfant's attempt to recover its delay damages and increased construction costs. The Appellant responded to the FS reliance on L'Enfant by attempting to distinguish the case on the basis that L'Enfant involved a 99- year ground lease and thus it would ultimately not own the building. The Appellant says the fact that Omni would not own the building takes this matter outside of our fact situation.

We find little in the FS's or Appellant's arguments regarding L'Enfant which are useful. The fact is that the lessor in L'Enfant was seeking damages which were not part of its real estate interest. That is not the case here. Here, as we noted above, a leasehold is composed of both the leasehold interest and reversionary value. Here, Omni is simply seeking to recover that real estate interest and is not trying to recover construction damages.

The reversionary value damages in this case turn on foreseeability. Foreseeability applies to both the type of damages and the amount. The foreseeability of the amount is a matter that will vary depending on factors such as the nature of the building, how the reversionary value relates to the

amount being paid on the lease by the government and to what degree the lessor is being compensated through payment of lost income. In this appeal, we have found that the dollars we have allowed for the reversionary value qualified as foreseeable and reasonable. We, however, point out that we are not setting out in this decision a plug-in formula for future cases. Rather, recovery, if any for reversionary value, will turn on the specific facts of each case.

NEW BUSINESS

As an adjunct to its claim of lack of foreseeability, the FS challenges the reversionary and income damages, claiming that Omni should not recover because it is a new business with no history and therefore any profit was speculative. The FS acknowledges that there is no per se bar to lost profits for a new venture. It then, however, asserts that there is a “presumptive rule that lost profits are difficult to establish for new ventures.”

If we had to engage in substantial speculation to establish profit, we would find against Omni. However, here we have substantial facts and substantial expert testimony that in our view provide reasonably likely numbers from which we can draw reasonable inferences. The record as to the measurement of reversionary value uses projections reached by the Rigbys, who we find to be experts in making such an evaluation. In arriving at the number, the Rigbys took into account the possibility of problems and reached a number that the Rigbys concluded was the most likely scenario. Mr. Johnson, but for his contention that Omni would not have been able to secure a loan, does not question the reversionary value reached by the Rigbys in Scenario One. The fact is that had the building been constructed and FS taken occupancy, as we have concluded would have been the case but for the termination, it was highly likely that Omni would have had a valuable asset at the end of the 10-year lease. We cannot establish that value to a certainty and surely various risks and events could have changed the final number, however, the project was terminated and thus we will never have a hard figure. What we do know is that Rigby came up with a number that takes into account factors both good and bad. We find that conclusion reliable. (FF 140-47.)

Omni is being asked here to prove a negative. It cannot prove profit for a certainty because the FS terminated and did not allow Omni to be in a position to show what would have happened. Under such circumstances, the FS has the burden of establishing that Omni would not have achieved the financial benefits it claims. We have also found, as is set out below, that Omni could have secured financing and could have constructed the building for approximately \$1.7 million in borrowed money and approximately \$105,000 in additional sweat equity. The FS argument that Omni should not be allowed profit because it was a new business has no merit.

COSTS TO COMPLETE

Appellant has claimed a profit on this project through both income and the lost reversionary value. The FS has contended that if the Appellant is entitled to reversionary damages, then the calculated reversionary value must be reduced by any out-of-pocket costs (beyond the amount Omni was to borrow) that Appellant would have expended to construct the project. We agree in principle with the FS that to the extent Omni had to provide additional dollars or sweat equity beyond the loan to

complete the building, that investment must be accounted for. The loan payments, but for the final payment, have already been accounted for in the cash flow assessment and thus are not a further deduction. As to the sweat equity Omni expended prior to the termination, that is not to be deducted. As of the date of the termination, that work was already in place. (FF 123.)

We find that the most likely sum to be borrowed was \$1.7 million from MIC. We base this on the testimony of Mr. Quayle, and particularly Mr. Hancey, as to the amount MIC was expecting to provide. (FF 104.) Consequently, any expenditure or sweat equity above that sum which would have been needed to complete the project is a cost that needs to be added to the \$1.7 million to establish actual costs to complete. Those costs, whether cash or sweat equity, represent costs that Omni would have had to contribute in order to complete the building. The costs, therefore, must be taken as a credit against the reversionary value, since they represent construction costs which otherwise would not be accounted for. (FF 121-127.)

The FS initially contended that Omni would have needed to come up with \$974,439 in out-of-pocket costs to complete the building. It arrived at that number by taking the cost schedule for construction of the building which Omni provided to Rigby for the 1997 Rigby appraisal. The cost figure Omni submitted to Rigby in 1997 was \$2.7 million dollars. The FS asserted that if anything, that cost was low, pointing out that Rigby, in its 1997 calculation of the cost approach for market value, increased the construction number given by Omni by \$200,000, due to the fact that Rigby considering the Omni estimate to be low. Nevertheless, the FS used the \$2.7 million as the cost figure needed to construct. (FF 37.) The FS arrived at \$974,439 by subtracting an anticipated loan amount of \$1,730,000 from the \$2.7 million, to establish how much more Omni would have had to come up with to construct the building. The FS points out that any costs above the loan amount would need to be accounted for as expenses, either in the income calculation or calculation of reversionary value. The FS has focused on taking it against reversionary value and while we agree in principle, we do not entirely agree in the result. In his expert report, Mr. Johnson decreased the amount he claimed Omni would need to expend over the amount Omni was intending to borrow. He reduced his figure from \$974,439 to \$464,000. The specifics of the reduction were not explained. As best we can determine, the reduction reflected what the FS considered a conservative view of Omni's needed contribution; reflected some acknowledgment as to the contribution of sweat equity, as to the value of the work already performed; recognized some reductions in scope and recognized items such as profit, which could not be categorized as out-of-pocket cost. When Mr. Johnson deducted the \$464,000 from the calculated present day value for the reversionary interest, the deduction still resulted in a negative number. Accordingly, the FS says Omni should not recover for lost reversionary value. (FF 127.)

Omni says that its maximum out-of-pocket cost to construct would have been less than \$1.7 million and not \$2.7 million. Since it intended to borrow no more than \$1.7 million, Omni asserts that the reversionary value should not be subject to further reduction. (FF 117.)

Mr. Quayle testified as to App 162, which showed costs of approximately \$1.5 million. He reviewed how he came up with pricing for most of the work tasks and showed that a number of items became significantly less expensive because of changes in scope. He reviewed quotes from potential

subcontractors and compared those numbers to the numbers used by Rigby in the appraisal. He said that the Rigby numbers represented value, not cost. App 162 had two columns. It listed on one side the values used to arrive at \$2.7 million and next to that listed what Omni described as actual planned costs, which totaled \$1.5 million (rounded). Some of the differences, such as the reduction of \$112,000 in architectural /engineering cost, reflected sweat equity already provided by Mr. Kirby, who had performed most of his work by the time of the termination. Other reductions involved work provided by Mr. Foster. In the case of electrical costs, the reduction of \$46,150 was due to changes in the scope (the elimination of parking lot pole lighting). Mr. Quayle explained that the reduction of \$63,940 for the elimination of communication wiring reflected the fact that the FS, instead of Omni, was providing the labor to put in the wiring. The building, however, would be fully wired and thus the value of the wiring remained in the structure. Mr. Quayle explained a \$30,000 reduction in painting, as sweat equity from himself and his son. (FF 114, 116-17, 120-24, 126-27.)

For the most part, Mr. Quayle provided a detailed and thorough review of how Omni arrived at its anticipated costs to construct. Not all reductions, however, were addressed. For example, masonry showed a drop of \$16,500, which Mr. Quayle explained was due to the fact that Omni had decided to do the masonry work through a stucco operation. But the cost estimate showed no accompanying increase in the stucco costs. There were other items that similarly were not explained. On balance however, Mr. Quayle's expected expenditures appeared generally credible. In addition, as Mr. Quayle conceded his final construction costs did not include the value of the sweat equity that remained to be provided by himself and others. The value of the remaining sweat equity was identified at one point as significant, but it was never quantified. The FS did not provide evidence of a better alternative than what was provided by Omni. (FF 116, 120-27.)

Due to the termination, the supervisor's building was never constructed. As a result, there is no way to determine to a certainty what the construction would have actually cost. In weighing the evidence, we first find that the claim that construction would have cost \$2.7 million is not reasonable. First, the \$2.7 million amount is an appraisal or value number and not a construction number. As such, it is understood by people in the construction industry to not represent actual construction costs. Mr. Quayle compared the value to cost, as akin to retail versus wholesale. His testimony was confirmed by Mr. Anderson and Mr. Rounds. (FF 117, 119.) The \$2.7 million amount is further flawed as a means to establish cost to construct, because it reflects a proposed scope that was significantly changed and fails to reflect lower subcontract pricing than that initially used by Omni. The FS provided no specific rebuttal testimony to the above, but rather chose to rely on the fact that Omni provided Rigby a figure of \$2.7 million at the time of the initial appraisal and considered that enough. (FF 116.) Reliance on that early estimate is not warranted, given the overall evidence. (FF 122-24.) While we have confidence in the competence and credibility of the Rigbys in regard to appraisals and believe the Rigbys have general knowledge of construction and its costing, the Rigbys are not construction cost experts, nor do they construct buildings. They stated that they relied on numbers given them by Mr. Quayle. But those numbers were given as part of an appraisal to establish value, not to establish the final cost of construction. (FF 37. At no time did the Rigbys state that they disagreed with Mr. Quayle as to the general proposition that he could lower his earlier costs. Mr. Johnson also acknowledged that he was familiar with approaches such as buy-outs, which lower costs. (FF 127.)

While Mr. Quayle provided a detailed explanation as to his expected costs, we are not convinced that the \$1.5 million amount for construction that he set out on App 162 represented Omni's actual costs to construct. We so conclude because there were a number of unexplained reductions; because Omni's cost figures were based on subcontractor quotes and not signed contracts; because Omni's quotes had expired at the time of the anticipated construction; because we recognize that at best we are dealing with estimates; because there were some hard costs still owed to Mr. Foster; and finally, because there are risks of overrun in any construction project. Also, while Omni had sufficient time remaining to complete, we find that Omni may very well have accelerated some activities to meet the final date, since it was going to have to perform in less than 6 months. Finally, there are elements of sweat equity which are not accounted for in the \$1.5 million. (FF 127.)

Rather than accepting the FS figure or Omni's latest estimate, what we find most persuasive as to the cost of construction before sweat equity is the amount that Omni intended to borrow and what MIC intended to lend. According to Mr. Hancey, he was anticipating providing a loan of \$1.7 million. (FF 102.) Logic tells us that on a project of this nature, borrowers do not normally borrow more than they might ultimately need, and lenders such as MIC, which could ultimately have to take over if the loan went bad, typically do not lend more than necessary. Mr. Johnson confirmed that general proposition. (FF 127.) The \$1.7 million figure which MIC planned to lend, in our view, better represents the likely out-of-pocket cost to Omni, than does the \$1.5 million Omni claims. That is not an exact figure, but represents our best estimate.

We therefore start with a hard dollar cost of \$1.7 million. However, that figure still needs adjustment. As Mr. Quayle testified, in addition to what it would pay out in cash, Omni also intended to provide sweat equity. Had the project not been terminated, Omni would have performed through sweat equity a number of tasks to complete the building. In arriving at the \$1.7 million, we have taken that into account as to minor matters. Two work tasks we have not taken into account in the \$1.7 million, and which Omni would have had to perform to ultimately build the structure, were the painting (to be done by Mr. Quayle and his son) and providing construction overhead functions. Both of those work tasks were to be delivered through sweat equity. (FF 126.) Those figures, as identified below, are separately deducted as costs.

Overhead was originally included as a cost in some of Omni's submissions. Specifically, it was included in the original Rigby number. Had the building been constructed, Omni would have had to provide construction overhead. Because the building was not constructed, it did not have to do so. Overhead varies depending on a variety of circumstances. We take judicial notice that a typical rate on construction projects for home office overhead is 10% against the costs. Here, we recognized that Omni was a lean operation and the function was being performed by Mr. Quayle. As such, we consider a 6% overhead cost for home office to be more appropriate. Overhead at that rate is applied against the \$1.7 million less the cost of the land. Accordingly, we take 6% of \$1,481,600, yielding a cost of \$88,896. We add to that overhead figure a cost for the painting to be performed by the Quayles as sweat equity, which we value at \$30,000, based on the quote received by Omni. The combined cost for the items is \$118,896 (which we round to \$119,000) (FF 126.)

For the Board to omit valuing the sweat equity not included in the \$1.7 million that Omni would borrow, would give Appellant the fruits of the labor (the reversionary interest) without properly taking into account the costs needed to complete the structure. Accordingly, when we look at final value, these expenses need to be considered.

LOSS OF RENTAL INCOME

There is no material dispute as to the income that was to be generated from the rent on the property. The FS describes the income flow to be from the government and from the open market lease. The FS agreed to lease 75% of the leased space at \$10.44 a square foot. The FS assumed the remaining space would rent for \$9.50 a foot. The assumed vacancy rate was 50% for the first year on the market space and then 20% per year thereafter. That is generally agreed to by the parties. (FF 36, 140.)

Net cash flow during the 10-year lease is measured by subtracting operating expenses and finance costs from the anticipated lease income over that period. In general, the parties agreed to expenses, including the deduction of debt service as an expense. (FF 134.) The one major disagreement between the parties centered on whether or not to include management fees as an expense. The Appellant claimed that since management was to be provided by sweat equity, it should not be deducted as an expense. (FF 137.) The FS argued otherwise (FF 134-36). Rigby used a percentage basis of 5% for calculating projected management fees, which came to \$167,625 over the 10-year lease term. If we do not include the \$167,625, Omni would have had a positive cash flow. In contrast, including management fees as an expense results in a slightly negative cash flow over the life of the lease. (FF 137-39.)

We find that the FS is correct in its position that the management fees should be deducted as expenses. We find the testimony of the Rigbys and Mr. Johnson on this matter more convincing than the testimony of Mr. Oyer. They testified that the fees had to be included as a cost, whether provided by sweat equity or not. They testified it is commonly included. (FF 134-37.) Finally, we note that management as an expense was included in Mr. Oyer's first draft of his report. He removed it as a cost after being contacted by counsel for Omni. In explaining the removal, he said that at the time of his draft he did not know that Omni was going to provide its own management. In addition, Omni showed management as an expense in a number of documents prepared prior to the termination. (FF 137.)

Management is a cost of running a building. It requires the presence and time of an individual or staff. Here it would have required the time of Mr. Quayle. If the building had been constructed and rents received, Appellant, through Mr. Quayle, would have had to manage the building. Because of the termination, Mr. Quayle no longer had to provide that service. He was free to use that time for other pursuits. Not counting management as a cost would give Appellant the rent, without accounting for the management operations. That is not reasonable. (FF 134-36.)

Once we include management fees as an expense, the NOI is a negative number. Accordingly, there is no lost income recovery. (FF 139.)

REVERSIONARY CALCULATION

The reversionary value of a building can be calculated in more than one manner. However, the evidence established that for a rental property, such as the supervisor's building, the only appropriate way to calculate reversionary value was by means of the income approach. That is how both the Rigbys and Mr. Johnson calculated the value. (FF 140-41.) The cost approach used by Mr. Oyer is not a favored or appropriate approach. Moreover, in addressing Mr. Oyer's particular calculation of the cost approach, both the Rigbys and Mr. Johnson stated they had never seen a reversion calculated in that manner, pointing to the starting number as well as the inappropriate use of IRS principles in a real estate matter. (FF 149-50.) The evidence was clear that the Rigbys and Mr. Johnson had considerably more experience in real estate valuation than Mr. Oyer and reversionary value is a real estate calculation. We found their criticism of Mr. Oyer's report to be generally warranted and accurate. Accordingly, we do not spend time here reviewing Mr. Oyer's calculations under the cost approach. His method was not an accepted method for arriving at the reversionary value. We reject Mr. Oyer's conclusion that this was not a real estate valuation. We also note that where it suited his purpose, such as the use of the \$2.3 million base value, he did not decline to use Rigby's real estate conclusions. (FF 31, 129, 148-50, 159-60.)

Calculating reversionary value is a real estate exercise. The Rigbys laid out in detail how they and others in the industry established or would establish the reversionary value by means of the income approach. The reversionary value is the value to a purchaser/investor purchasing the property in 2007, after the 10-year lease had run. In making the valuation one looks at anticipatory rent from 2007 to 2017. A purchaser buying the reversionary interest is purchasing the right to that future income and that drives the price he will pay for the property. That is typical in investment property, such as the supervisor's building. (FF 140-47.)

The Rigbys explained how they arrived at their estimated reversionary value. The first step they used to calculate the reversionary value was to determine the estimated NOI for the period from 2007 to 2017. To come up with the NOI, the Rigbys made a number of projections such as the amount of rental income and expenses starting in 2007, the absorption rate for occupancy after the initial lease and estimated occupancy during the term. The Rigbys included a figure for management fees in the expenses. We have discussed that item in relation to the projected cash flow from 1997 to 2007. Here, just as there, it was properly included in expenses. (FF 146.)

The Rigbys' assumptions as to expenses and income, while not certain and estimated, appear reasonable. In calculating the NOI, the Rigbys did not deduct debt as an expense. That is in accord with how the calculation is done in the real estate industry for purposes of an appraisal arriving at a reversionary value. The Rigbys then capitalized the NOI (difference between income and expenses) by using the yield capitalization method. They considered that to be more appropriate than using the direct capitalization approach. In this instance, capitalization of NOI meant applying a rate of 11% to the estimated NOI for the period running from 2007 to 2017. The Rigbys used a capitalization rate derived from comparing the ratio of NOI to sales price in other similar income generating properties. The Rigbys then determined that the reversionary value on December 31, 2007 was \$1,431,672. They then adjusted that figure downward to account for 4% sale commission and tenant improvements needed to bring the property to a saleable condition in 2007. The total with deductions

was \$1,304,403 before reduction to present value and the deduction of the last remaining principal payment. (FF 138-39, 145-46, 149.)

PRESENT VALUE

Both parties agree that the reversionary value of the property, calculated as of December 31, 2007, whether it was calculated using the income approach or another approach, should be reduced by a present value calculation (FF 154). Present value involves discounting future dollars to reach a sum which reflects what that money would have been worth at an earlier time. It is a discounting concept that applies to earnings in the future or other expectancy damages. (FF 154-56.) Courts regularly adjust recoveries for present day value in torts, estate matters and in other legal proceedings, so as to assure that a party, awarded damages or a right to future income, does not recover a windfall by receiving future dollars before that party would otherwise have received the money.

Discounting for present value is also commonly used in real estate valuations. It is used for lending purposes and for providing a value to a potential investor, to establish how much one should pay for a property today (or at some other set time), so that it would be worth a specific value at some future point in time. An investor investing in a property, such as the supervisor's building, would take into account, in setting what he would pay for the property, the amount he could get for alternative investments over that same time, as well as the comparative risks associated with an alternative or real estate investment. (FF 154-55, 163, 167.) The damages associated with reversionary value in these appeals concern what someone would have paid in December 1997, for the right to own the supervisor's building starting in December 2007 (FF 155-57). That figure is independent of the income the leaseholder would be receiving from December 1997 to December 2007. The reversionary value calculation assumes that the purchaser would not take the property until after the expiration of the 10-year lease with the FS; and therefore, the investor could not be certain as to the amount of the future income stream, starting in 2007, which he would be purchasing. The status of rentals, after the initial 10-year government lease was not guaranteed and thus uncertain. (FF 155.) While the parties agree in principle to discounting for present day value, they disagree as to the discount rate that should be used and disagree as to the date to which the reversionary value should be discounted. The FS says the discount should use a rate of 13% against the 2007 value. That rate combines factors (or percentages) for both time and risk. The FS also asserts that present value should be calculated to December 31, 1997, the date of occupancy, had the building been constructed. That is the effective date of the breach for purposes of damages, since the building would have no value as an investment property until that date. (FF 157, 161-65, 168.) The Appellant asserts that the proper discount rate is 4.92% (an essentially risk free treasury rate). It says the discount should be taken from December 31, 2007 to the date of judgment (which at the time of Mr. Oyer's report was estimated at March 2002) in this proceeding. (FF 167.) Implicit in the Appellant's position is that we use the actual judgment date.

Appellant contends that the Board is mandated by law to discount here only to the date of judgment and that it would be improper to discount back to 1997. To support its contention, Appellant relies on testimony from Mr. Oyer and on Appellant's interpretation of court decisions in Energy Capital and Northern Helix. It contends that Energy mandates the Board to discount only to the date of

judgment and Northern Helix provides that the Board is not permitted to apply a risk factor to Omni's damages for loss of the reversionary value. We disagree with Omni's application of the law as to both the date to which we take present day value and as to the use of risk as part of the discount rate.

In Energy, the Federal Circuit addressed (1) the use of a risk adjusted discount rate, rather than a risk free rate and (2) also addressed whether in applying present value to future profits, the adjustment should be made to the date of breach or date of judgment. Both of these questions are in issue in this appeal. Energy involved a termination by the Department of Housing and Urban Development (HUD) at the very early stages of a contract, where Energy had agreed to provide lending to HUD households for energy up-upgrades. At the time of termination, Energy had done preparatory work, but had not placed any significant loans. The trial court determined that Energy had established that it was going to make a profit on the contract and that Energy's profit was going to be made incrementally over the 10-year contract term. The trial court concluded that such damages needed to be discounted to reflect the fact that the profits involved future earnings. The trial court then proceeded to discount the damages and there made two conclusions, which were later addressed by the Court of Appeals. The trial court discounted Energy's projected damages to present value and over the objections of the government, the trial court took present value back to the date of judgment, rather than to the date of breach. Second, the trial court, over government objections, applied a risk-free discount rate.

In arguing before the trial court, Energy had taken the position that once the existence of future profits had been established, the sole purpose of discounting was to account for the time value of money, i.e., that Appellant will attain profits earlier than otherwise. Citing to Lasalle Talman Bank FSB v. United States, 45 Fed. Cl. 64, 109 & n. 69 (1999), aff'd in part and rev'd in part on other grounds, 317 F.3d 1363 (Fed. Cir. 2003); see also 22 Am. Jur. 2d Damages 647 (1988). Energy also cited the trial court to Northern Helix, 634 F.2d at 564 (future profits for the Government's breach were properly discounted to judgment date using the risk-free rate of return on conservative instruments) and argued that no further consideration of risk was appropriate, because risk had already been considered in determining if profits existed. The government argued that the discount rate, which applied to anticipatory profits, represented the return an investor would require in order to risk investing capital in a particular venture; and that such rate must therefore incorporate any risk that the anticipated cash flows would not be realized. The government also argued that the court should follow the general rule of discounting to the date of breach.

The decision of the lower court was appealed. In addressing the lower court decision as to the date to which to discount, the Court of Appeals stated:

"The time when performance should have taken place is the time as of which damages are measured." Reynolds v. United States, 158 F. Supp. 719, 725, 141 Ct. Cl. 211, 220 (1958). In many cases, the appropriate date for calculation of damages is the date of the breach. See Estate of Berg v. United States, 687 F. 2d 377, 380, 231 Ct. Cl. 466, 469 (1982). The rule does not apply however, to anticipated profits or to other expectancy damages that, absent the breach, would have accrued on an ongoing basis over the course of the contract. In those circumstances, damages are measured

throughout the course of the contract. To prevent unjust enrichment to the plaintiff, the damages that would have arisen after the date of judgment ("future lost profits") must be discounted to the date of judgment. See Northern Helix Co. v. United States, 634 F.2d 557, 564; 225 Ct. Cl. 194, 205 (1980) (discounting anticipated profits to the date of judgment). Discounting future profits to the date of judgment merely converts future dollars to an equivalent amount in the present dollars at the date of judgment; it is not an award of prejudgment interest and does not violate sovereign immunity.

Applying the above reasoning, the court found that the lower court acted properly when it decided to discount the lost profits to the date of judgment. To put that in context, however, the Court of Appeals concluded that almost all of the lost profits in issue in Energy would have been earned after the date of judgment. As we discuss below, the damages for reversionary value are damages as of December 1997. Thus, we do not have the accrual damages, which drove the Court of Appeals decision.

The Appellate court also addressed the lower court's decision to use a risk-free discount rate. The court found the trial court to be in error and specifically addressed the lower court interpretation of Northern Helix, which the trial court read to mandate, as a matter of law, that the discount rate must be a rate of return on "conservative investment instruments," such that the rate could not be adjusted for risk. The trial court had ruled in that manner, notwithstanding the fact that experts for both parties had testified that it was appropriate to apply a risk based rate to the profits in issue. In rendering its decision, the trial court had taken the unusual tack of pointing out that it thought the defendant in Energy had presented a cogent argument for why the discount rate should consider the riskiness of the endeavor, but nonetheless felt bound by Northern Helix.

The Court of Appeals addressed the exclusion of the risk factor by the lower court. It stated that the "appropriate discount rate is a question of fact. See, e.g. Robert L. Dunn, Recovery of Damages for Lost Profits 6.25 (5th Ed. 1998). . . ." The court stated that the purpose of lost profits calculation was to put Energy "in as good a position as [it] would have been in had the contract been performed. Restatement (Second) of Contracts 344(a)." The court then expressly rejected the proposition that the sole purpose in discounting was to account for the time value of money. The court said that when "calculating the value of an anticipated cash flow stream pursuant to the DCF (discounted cash flow) method, the discount rate performs two functions: (i) it discounts for the time value of money; and (ii) it adjusts the value of the cash flow stream to account for risk. See Richard A. Brealey and Steward C. Myers, Principles of Corporate Finance, p. 244 (6th Ed. 2000) (explaining that when valuing an anticipated cash flow, 'if the cash flow is risky, the normal procedure is to discount its forecasted (expected) value at a risk-adjusted rate . . . The risk adjusted discount rate adjusts for both time and risk.')

The court made it clear that Northern Helix did not mandate that a conservative discount rate is always required, as a matter of law, when calculating lost profits. It stated that it was not holding that in every case, a risk adjusted discount is required. Rather, "...we merely hold that the appropriate

discount rate is a question of fact. In a case where lost profits have been awarded, each party must present evidence regarding the value of those profits, including an appropriate discount rate.”

Returning to Omni, the overriding point is that the claim for damages rests on a real estate evaluation and rests on real estate principles. We find unconvincing Mr. Oyer’s claim that we should treat the reversionary value figure arrived at for 2007 as simply a damage number. Mr. Oyer stated that the discount rate used by the FS considers “real estate risks,” and he concludes that real estate risks are not appropriate or relevant at this stage of the assessment of damages. He treats the number as if it is a hard and fast amount that would be waiting for Omni in 2007. (FF 163-64, 167, 169-70, 172, 173-75.)

However, the reversionary value was calculated by applying real estate principles and those principles do not disappear simply because of the need for a present day valuation. Larry Rigby and Mr. Johnson established to our satisfaction that the real estate industry uses risk as part of its calculation of present day value. (FF 166-69.) Mr. Oyer has given us no reason to reject the accepted industry approach.

Another fundamental flaw in Mr. Oyer’s analysis is that we are not looking at what someone would have paid in 2007. Rather, as explained by Mr. Johnson and Rigby we are looking at what someone would have paid in 1997 for the right to own the building in 2007. As Mr. Johnson explained, if someone is sitting in 1997, what would they be willing to pay Omni in 1997, for the right to own the building in December 2007. They would be purchasing in 1997, knowing that they would not get anything for the first 10 years, because the cash flow was going to Omni. In deciding how much they would pay for the future income (that income starting in 2007), they would have to consider all of the risks associated with owning an asset for which they could not derive a benefit until 10 years in the future. (FF 166-69.)

Larry Rigby stated, in explaining how to derive present value, that the value in the future is discounted to the present value, “which would be the number that someone could invest that much money into that typical investment to arrive at the final figure at the end of the projection period.” Key to his statement is that one is arriving at a rate by looking at the same typical or same class of investment. He is comparing like things. So because this is a real estate investment and not an investment in a CD or even treasury note, Mr. Rigby used a discount rate of 13% which reflected the rate for this type of application. As Mr. Rigby explained, if one invested \$385,000 in 1997 at 13% interest (the rate which one would expect on this type of investment), at the end of year 2007, one would have \$1,304,403. (Tr. 7-7, pp. 15-17.)

As pointed out by the Rigbys and Mr. Johnson, a real estate investor who would invest his money in 1997, but receive no right to income until 2007, would be assuming risks associated with that investment that would need to be reflected in what price he would pay. A purchaser would be holding the ownership of the reversionary interest in 1997, but would be subject to a myriad of possible events over that 10-year wait period, some of which could negatively affect its investment and future ownership. As pointed out by Mr. Rigby, a real estate venture has risks as to proper management, uncertainty as to the terms of the lease after the initial term, and maintenance matters.

Mr. Johnson pointed out that risks such as having the lease terminated because of dissatisfaction with management's meeting its service requirements, natural disasters or other risks could make the building unusable or unrentable. The most evident risk, however, has to do with occupancy. It would be illogical, absent special circumstances (none identified here), for any prudent business person not to discount for risks under those circumstances. Even if we put aside the prospective purchaser and assume that Omni would hold the property, Omni would have faced the same uncertainties as to what would happen over the first 10 years and what might happen thereafter. (FF 166-69.)

In addition to accounting for risk in any valuation of the property, a party purchasing a reversionary interest such as that in these appeals would be tying up the money for 10 years with no income flow to show for that. Consequently, a prudent investor, at a minimum, would need to recover the lost income opportunity for that period. Moreover, since this investment was one in real estate, where there can be no certainty in projecting out 10 years, and where risk is a factor, it would be reasonable and logical to expect that investor to require a greater return than he would receive from a simple risk free investment, such as a treasury note. While real estate has up-sides, sometimes significant, a real estate investment can also lead to a loss. The 13% used by Mr. Johnson and the Rigbys takes that into account by using the methodology commonly used and accepted in the industry for valuation. (FF 165-69.) In contrast, Mr. Oyer gives that no weight and creates his own approach, which ignores the fact that we are valuing a real estate interest.

We find that the evidence shows that the 13% rate used by the Rigbys and Mr. Johnson was in line with typical discount rates for this type of investment in the area, taking into account both time and risk and conformed with practices in the industry. They did not pick a number out of the sky. Additionally, the record shows that Mr. Rigby, in fact, used a slightly lower rate than typical in the area to reflect that the expected tenant was the FS. Both the Rigbys and Mr. Johnson demonstrated expertise in the subject matter of valuing the real estate in both 1997 and 2007, they were familiar with how present day value was calculated for reversionary interest. While we do not question Mr. Oyer's expertise as an accountant, in this case he did not have the equivalent experience or expertise of those upon whom we have decided to rely and who we found to be more knowledgeable as to the specific matters before us. (FF 31,145, 154, 156.)

Fundamental to any calculation of contract damages is the basic legal maxim that damages are awarded so as to place the injured party in as good a position as he or she would have been had the breaching party fully performed. Miller v. Robertson, 266 U.S. 243, 257-58, 45 S.Ct. 73, 78-79, 69 L. Ed. 265 (1924.) Here, to discount at a rate of 4.92% would remove from a risk investment any element of risk. That would do more than put Appellant in as good a position, it would put it in a better position. Similarly, if we only discount to the date of judgment then we take out risk as a factor for all years prior to now. If this was accrual damages, that approach would make sense. But we deal not with accrual damages, but rather the value in 1997 of a future interest.

Energy makes it clear that discounting can include both risk and time and it is up to the fact finder to decide whether the factors need to be included in reaching the goal of putting the damaged party in the same position he would have been but for the breach. Here, for us not to include risk and to not discount to December 31, 1997, would provide a windfall for Appellant. It would invalidate the risk

component of the discounting and provide Appellant with more than it could have gotten if the matter had been conceded and paid for as of the time of breach.

Finally, this appeal arises under the Contract Disputes Act. Under the Act, a party is entitled to interest on its certified claim. Omni certified its claim in June 1998. Accordingly, interest will be recoverable on any damages we determine from that date forward.

CALCULATION

We have determined that under the facts in this appeal, in order for us to reach a proper measure of damages, we shall discount for both risk and time from December 2007 to December 1997. We use the Rigby present day reversionary value number less the discount for debt service. The adjusted present day reversionary value taken to December 31, 1997 is \$323,779. We then deduct from that sum what we have identified as saved sweat equity in the amount of \$119,000. That figure is an estimate and takes into account the sweat equity involved in painting, overhead and additional work by Mr. Quayle. The sum of \$119,000 is not reduced since it represents costs in 1997. After the deduction of the \$119,000, Appellant is entitled to \$204,779. Appellant is also entitled to interest at the CDA rates on that sum, starting from the filing of the certified claim in 1998.

DECISION

The appeal is sustained as to the default termination. It is sustained in part as to damages, as described in the foregoing opinion. Appellant is entitled to \$204,779 plus interest at the requisite CDA rates on the sum, starting from the filing of the certified claim in 1998.

HOWARD A. POLLACK

Administrative Judge

Concurring:

ANNE W. WESTBROOK

Administrative Judge

VERGILIO, Administrative Judge, dissenting.

I dissent from the majority, whose decision departs from the lease contract and established case law. I deny these appeals. Under a lease for space, the erroneous reasoning makes the Government liable for the value (projected as of the end of the lease term, but reduced to a present value of the money) of a building never constructed by a lessor unable to obtain

a firm commitment of funding for several months after entering a lease that required evidence of such a commitment within 15 calendar days of award. To summarize the majority opinion, the termination for default was improper; because this constituted a breach of the lease contract for space for a fixed period of years; the Government is required to pay the lessor the value of the building that could exist at the end of the lease term. The lessor did not construct the building or assume any of the liabilities (in terms of time and money) that completion would have required. That is, the Government is paying the lessor a price for a building never constructed and never occupied by the Government; the lessor gets the equivalent of a “free” building at the same time that the lessor could have invested its money and time after the default termination to its separate advantage. Apart from the impact in this dispute, without reversal, this decision lends support to the notion in on-going and future leases that the Government foreseeably envisions such a liability at the time it enters into a simple lease to occupy space during a fixed term.

First, I uphold the termination for default. The objective evidence indicates that, by the end of the cure period, this lessor had failed to fulfill explicit lease requirements and the Government could reasonably conclude that the lessor had failed to provide assurances of its ability to complete construction so as to permit timely occupancy. The contracting officer was not compelled to make presumptions and assumptions in favor of the lessor, that this time the lessor would in fact complete the given tasks by the upcoming dates proposed by the lessor; the lessor had made many promises prior to the cure notice regarding the same matters and had failed to fulfill those promises. Similarly, the contracting officer did not have to assume that the lessor could complete construction within the remaining time. A contracting officer is not required to read into a prior schedule from the lessor, with the statement that acceleration is possible, that the tasks will be accomplished within a shortened time frame. The lessor’s suggestion, that it could utilize the entire cushion built into its schedule before construction begins, does not provide assurance that sufficient time will remain for timely completion should delays arise during construction. When the lessor notified the contracting officer that the lessor could not complete the elements identified in the cure notice by the end of the cure period and provided no details as to its ability to complete construction by the occupancy date, the contracting officer acted reasonably in issuing a notice of termination for default.

The majority errs in concluding that the lease contract contains no enforceable terms demanding lessor compliance other than those requiring occupancy by a given date. The lease contract has requirements for the lessor to satisfy prior to building occupancy. The Government is entitled to enforce the specific requirements and demand assurances that satisfactory progress is achieved. The majority permits the lessor to dictate when it will accomplish tasks, without regard to the time limits and clauses specified in the lease contract. The lessor was unable to obtain a firm commitment of funding within a several month period, despite the lease requirement for proof of such a commitment within 15 calendar days of award. Without funding, this project would not be completed; performance was endangered. This failure to obtain funding establishes a reasonable basis for concluding that there was inadequate assurance that this lessor could perform.

This aspect of the case and proceedings epitomizes what the appeal process is not meant to encompass. This contracting officer sought from the lessor proof of compliance with a requirement of the lease for a firm commitment of funds, and of compliance with the lessor's schedule for the submission of a building permit and approved plans, as well as an explanation of the lessor's ability to provide occupancy at the designated time. The lessor responded by stating that it could not comply within the time frames for the submission of the three items, and was silent with respect to providing a schedule that would demonstrate an ability to provide a building ready for timely occupancy. Moreover, while viewing the termination for default as invalid, and proceeding as if obligations continued under the lease, despite several weeks of communications with the contracting officer, the lessor failed to notify the contracting officer that it had accomplished the tasks identified in the cure notice--the communications indicated that tasks remained incomplete. Even if the lessor and a majority on the panels of judges at this Board resolving this dispute may not have issued a termination for default, that is not the test. The conclusion that the contracting officer could not have a reasonable belief that there was no reasonable likelihood of timely completion is reached without regard to the facts. This contracting officer was not required to engage in discovery, depositions, or subject individuals to examination and cross-examination under oath. The lessor had failed to satisfy promised dates for completion of given tasks, the contracting officer sought assurances, did not obtain those assurances, and reached a reasonable conclusion accordingly.

Second, assuming that the termination for default was invalid, such that a Government breach occurred, the majority incorrectly awards breach damages sought by the lessor. The lease obligates the Government to pay rent for the ten-year lease term; specific clauses emphasize that this obligation exists even when space is vacant. The lease, therefore, limits the Government's basic liability to the payment of rent for the ten-year lease term. In this instance, the lessor did not have the building ready for occupancy--no building was constructed; moreover, the record demonstrates that the lease would not be profitable to the lessor for the initial ten-year term. Under these circumstances, the lessor is not entitled to lease revenue that would have been off set by expenses and costs of performance. The lessor seeks, and the majority grants, relief apart from that which the lessor would receive under the lease contract. The reversionary value does not represent expenses or anticipated profits arising under the lease and related to the breach.

Third, the majority incorrectly awards a reversionary value (the projected price that the building would sell for in 2007 less the projected cost to sell the building) in both fact and amount. Although it was understood and foreseeable that the lessor would have the building at the conclusion of the lease, the record does not demonstrate that either party contemplated that the Government would be liable for the value of the building at the conclusion of the lease term. It is incorrect to conclude that the Government foresaw a potential liability for the value of the building (particularly, a building whose size and value was not definitized at the time the lease was signed). The Government leased space, it did not purchase a building for or from the lessor. The value of the building at the commencement and conclusion of the lease term is not relevant to the terms and conditions of the lease contract. The construction of the building represents a collateral undertaking of the lessor. The building would represent an investment of the lessor; although the value of

the building may increase by the end of the lease term, that change in value does not arise under the lease contract in question. This anticipated benefit to the lessor at the conclusion of the lease is not recoverable under the breach found. This analysis is true if the building is constructed solely for use by the Government for the rental square footage identified in the lease contract. The analysis seems more patently true as the building grows in size to accommodate more than Government. The Government is not guaranteeing a construction project of the lessor.

The majority utilizes a reversionary value of the building that reflects projected income from never constructed lease space (that is, a future profit from the building arising after the end of the Government lease). Lost future profits, not arising under the lease, are not compensable. Similarly, if another method of calculation were utilized for the reversionary value, the projected escalated value of the building never built would not be recoverable; that increase in real estate value does not arise under the lease and is too speculative.

By awarding the lessor a reversionary value of the building never constructed, the majority places the lessor in a far better position than it would have been had the lease been fulfilled.

The lessor did not invest the money and effort required for the construction of the building. It could utilize those resources elsewhere, as it chose. The lessor now has the benefits of the investments of the resources not used because of the default, and receives the benefits of projected building value based on a minimal investment. Such a recovery is not here warranted.

Further, the majority mistakenly looks to the reversionary value of the building in 2007, at the conclusion of the firm, ten-year term of the lease. The found breach occurred prior to the construction of the building. A consistent approach in assessing damages would project the value the building as of the time of the breach, or at the latest, at the time of anticipated, initial occupancy. Such an valuation would ensure that the value of the building reflects the actual and projected costs and income of the lessor to construct and operate the building, including the anticipated losses to be incurred on the Government occupied space during the initial lease of the building.

So as not to lose the reader in a myriad of unnecessary facts, rather than recite each of what I deem to be the various factual and legal errors of the majority, I identify from the record what I determine to be the material facts of the case and the required rationale for resolution. Objectively, the termination for default must be upheld. The other matter I specifically address is the inappropriateness of awarding the lessor a reversionary value for a building (never constructed) under a lease with the Government.

Material Facts

The Solicitation

Among various items, the solicitation requires an offeror to submit:

- (a) Satisfactory evidence of a conditional commitment of funds in an amount necessary to prepare the space. Such commitments must be signed by an authorized financial officer and at a minimum must state: Amount of loan; term in years; annual percentage rate; length of loan commitment.
- (b) Evidence of ownership or control of site (i.e., deed, partnership agreement, corporate resolution, etc.)
- (c) Other information as deemed appropriate by the offeror or as requested by the Government.

(Appeal File at 3 (¶ 1.6, How to Offer).)

The solicitation identifies the lessor's additional obligations with respect to providing evidence of a firm commitment of funds. The solicitation specifies:

Within 15 calendar days after award, the successful offeror/Lessor shall provide to the CO [contracting officer] evidence of :

- (a) A firm commitment of funds in an amount sufficient to perform the work required under this leasehold agreement.

(Appeal File at 67 (¶ 1.9, Award).) In contrasting this paragraph with that above, note the distinction between the conditional commitment of funds required prior to an offer and the firm commitment of funds to be established after award.

The solicitation requires the lessor to provide two construction schedules (one tentative and one final):

A. Within 15 days after award of the lease contract, the successful offeror shall submit to the CO a tentative construction schedule giving the dates on which the various phases of construction will be completed to coincide with the Government's required occupancy date (see paragraph entitled "Occupancy Date"). The finalized schedule is to be submitted no later than 30 days after award.

B. The schedule is to include timing for completion of design and construction milestones, including but not limited to, (1) submittal of preliminary plans and specifications, (2) submittal of other working drawings, (3) issuance of a building permit, (4) completed construction documents, (5) start of construction, (6) completion of principal categories of work, (7) phased completion, and availability of occupancy of each portion of the Government space (by floor, block, or other appropriate category), and (8) final construction completion.

(Appeal File at 69 (¶ 3.9).)

The solicitation contains a No Waiver clause:

No failure by either party to insist upon the strict performance of any provision of this lease or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent or other performance by either party during the continuance of any such breach shall constitute a waiver of any such breach of such provision.

(Appeal File at 125 (¶ 7, No Waiver (AUG 1992), 48 CFR 552.270-37).)

The solicitation indicates that the lease term will be for a ten-year firm term, with two five-year renewal periods (Appeal file at 63 (¶ 1.3, Lease Term/Termination)). The solicitation contains an Adjustment for Vacant Premises clause, 48 CFR 552.270-25:

If the Government fails to occupy any portion of the leased premises or vacates the premises in whole or in part prior to expiration of the firm term of the lease, the rental rate shall be reduced as follows:

The rate shall be reduced by that portion of the costs per square foot of operating expenses not required to maintain the space. Said reduction shall occur after the Government gives 30 days prior notice to the Lessor, and shall continue in effect until the Government occupies the premises or the lease expires or is terminated.

(Appeal File at 68 (¶ 3.7).)

The solicitation contains the following a Default in Delivery -- Time Extensions clause, stating in pertinent part: in paragraph (a):

- (a) With respect to Lessor's obligation to deliver the premises substantially complete by the delivery date (as such date may be modified pursuant to this lease), time is of the essence. If the Lessor fails to prosecute the work with the diligence that will insure its substantial completion by the delivery date or fails to substantially complete the work by such date, the Government may by notice to the Lessor terminate this lease, which termination shall be effective when received by Lessor.

. . . .

- (c) Notwithstanding paragraph (a) of this clause, this lease shall not be terminated under this clause nor the Lessor charged with damages under this clause, if (1) the delay in substantially completing the work arises from excusable delays and (2) the Lessor within 10 days from the beginning of any such delay (unless extended in writing by the Contracting Officer) provides notice to the Contracting Officer of the causes of delay.

(Appeal File at 125-26 (¶ 11, Default in Delivery -- Time Extensions (JUNE 1994), 48 CFR 552.270-28).) The solicitation defines "notice" to mean "written notice sent by certified or registered mail, Express Mail or comparable service, or delivered by hand. Notice shall be effective on the date delivery is accepted or refused" (Appeal File at 123 (¶ 1), 48 CFR 552.270-10(i), Definitions (AUG 1992).)

Further, the solicitation specifies what shall constitute a default by the lessor under the lease. It includes a provision that states, "Repeated and unexcused failure by Lessor to comply with one or more requirements of this lease shall constitute a default notwithstanding that one or all such failures shall have been timely cured pursuant to this clause." (Appeal File at 127 (¶ 16, Default by Lessor During the Term (AUG 1992), 48 CFR 552.270-33).)

In a paragraph addressing award, the solicitation states:

After conclusion of negotiations, the CO will require the Offeror selected for award to execute the proposed lease prepared by the Government which reflects the proposed agreement of the parties.

The proposed lease shall consist of:

- Standard Form 2, U.S. Government Lease for Real Property
- GSA Form 3517, General Clauses
- GSA Form 3518, representations and Certifications
- The pertinent provisions of the offer
- The pertinent provisions of the SFO

The acceptance of the offer and award of the lease by the Government occurs upon notification of unconditional acceptance of the offer or execution of the lease by the CO and mailing or otherwise furnishing written notification of the executed lease to the successful offeror.

Standard Form 2

This form will be prepared by the Government. The successful offeror must execute a U.S. Government Lease Form, Standard Form 2.

....

(4) When deletions or other alterations are made, specific notation thereof must be entered under Clause 8 of the lease before signing.

(Appeal File at 66-67 (¶ 1.9 Award).) The Lease Award clause (JUN 1985) (48 CFR 10.552.270-5), contained in the solicitation provisions, specifies, "The unconditional acceptance of an offer establishes a valid contract." (Appeal File at 119).

In seeking revised proposals, by letter dated March 1, 1996, the Government noted that the October 1, 1996, occupancy date found in the solicitation is probably unrealistic; the Government requested that the offeror provide an anticipated occupancy date (Appeal File at 216). The lease terms offered by Omni specify: "Space to be delivered within 300 calendar days from award"; this is the revised proposal, with a date of March 15, 1996, that is incorporated into the lease contract. Omni specifies that its offer is submitted upon the terms and conditions of its submission and in full compliance with and acceptance of the solicitation, with attachments. (Appeal File at 114.)

The lease (or contract)

By a letter of April 23, 1996, the contracting officer informed the lessor:

On behalf [of] the government, I am accepting your offer of 28,791 total rentable square feet of space for the Richfield Supervisor's Office and Fire Center at a rate of \$10.44 per square foot.

As discussed on the phone on Thursday, April 17, we will meet on Thursday, April 25th with Dennis Allen here in my office at 2:00 PM. Hopefully we can finalize the lease, discuss space layout, coordination between the Forest Service, the lessor and the other agencies involved, and timeframes.

(Appeal File at 217.)

The Government and lessor did not enter into a contemporaneous written lease agreement; the parties immediately did not sign a Standard Form 2 or assign a specific contract or lease number. However, both parties acted as if a binding contract had arisen, with the parties discussing the potential locations and designs of the buildings and taking further actions in anticipation of the lessor constructing the buildings and the Government taking occupancy. Although the parties did not sign a written document until April 1997, as noted below, the letter of acceptance creates a binding lease contract between the parties. The initial paragraph of the letter places no restrictions on the acceptance by the Government. The record does not indicate that the details to be worked out in finalizing the lease were of significance to limit the stated acceptance of the offer. The lease that arose incorporated the terms and conditions of the solicitation, including those referenced above.

The Government did not immediately demand compliance with the various provisions requiring submittals from the lessor. The parties were engaging in finalizing specifics regarding the construction that was to occur, while the lessor was engaged in discussions with the Bureau of Land Management regarding a potential lease for occupancy in the building here at issue. Such a lease would affect the size and numerous aspects of the construction. It was not until after the bureau notified the lessor, in January 1997, that the bureau would not seek space in the subject building, that the Government began requiring specific submissions from the lessor.

Proof of Financial Commitment

In early February, the Government was inquiring as to what was holding up the start of construction on the office building. As noted in a contract daily diary for February 6, 1997, the lessor indicated that it needed to have a commercial appraisal completed before funding could be finalized. However, the lessor anticipated that funding would be in place by next week, such that construction could start soon, weather permitting (Appeal File at 276). As noted in a contract daily diary for February 10, 1997, the lessor took pictures of the site, said to be needed to cross the final financial hurdle (Appeal File at 273).

The contracting officer informed the lessor, by letter dated March 3, 1997:

Over the last two weeks, I have received a couple of calls from your bank regarding the financing on the Richfield office[that is, the main office portion of the lease]. Since I awarded that lease to you on April 23, 1996 and not much progress has been made on the larger structure covered by this lease, I'm establishing some timeframes for information to be submitted that will assure us that this building will be built in the near future.

By March 14, 1997, please provide me with firm, financing papers from your bank. By March 24, 1997, please provide me with a set of final drawings. I need to do some space calculations and can not do that until I have a set of drawings reflecting all the changes. By March 24, 1997 I also need a progress schedule for the actual construction of the larger complex.

(Appeal File at 215.)

By letter dated March 13, 1997, Bank One informed the lessor that the bank would attempt to structure a financing package to meet the business objective of the lessor. The letter expressly states that it does not constitute either a formal commitment or an offer to enter into an agreement. (Appeal File at 213-14.)

The contract daily diary prepared by the Government for March 24, 1997, states: "Discussed the problem with not having the office building started yet. There are some problems in getting financing in place for this building. [The lessor] will get back to the CO [contracting officer] tomorrow with information from the bank. Decision will need to be made relative to

allowing [the lessor] to continue trying to arrange financing, or discussing the alternative of default and resoliciting the needs for the space.” (Appeal File at 263.)

On March 27, 1997, the lessor met with the Government; discussed was financing of the main office building, and the lessor’s understanding that its loan application could be processed within 30 days (Quayle Affidavit at 22 (¶ 61)).

On March 28, 1997, an exchange of e-mail between the contracting officer and contracting officer’s administrative representative, addressed the lease. The lessor had stated that, because his bank still would not give him a definitive answer on the loan, the lessor wished to obtain a loan through an insurance company. As the contracting officer understood the scenario, it would take the insurance company thirty days to “get the loan approved and get the financing to him.” This would mean that the lessor “could start construction May 1 and looking at 8 months; we would be looking at a Jan 1 moving date.” (Appeal File at 261.) The representative replied:

Do you think there is a chance we can get something more definite from the insurance company than Bob Quayle[’]s word? I think we need to get his plans in writing. I have been hearing this wait for another 30 day story since last October. If we don’t get our hands on something soon that assures us that his plan is in the hands of an insurance co and a letter from them saying it will be a done deal in 30 days, we will likely be looking at another plan of action on May 1.

(Appeal File at 261.)

The contracting officer informed the lessor, by letter dated March 31, 1997:

I relayed to the Fishlake National Forest your most recent proposal to pursue a parallel line of financing through an insurance company. I explained that within 30 days you would have either the financing and could start construction or you would know for certain that financing was not available. It is agreeable to allow you this 30 days; however, I will need a letter of intention from your insurance company by this Friday, April 4th. In this letter I would like to see their proposal outlined with firm dates for their final decision.

If neither line of financing can be confirmed in 30 days (by April 30th), the government agencies will then have to decide whether or not we want to continue with this lease for the larger structure or whether we will start over in seeking leased space.

(Appeal File at 206.)

As indicated in a letter dated April 7, 1997, to the contracting officer from the director, mortgage underwriting and marketing, of Equitable Life & Casualty Insurance Company, the

insurance company did not have an appraisal or loan application which would have permitted the insurance company “to really get into this deal” (Appeal File at 205). The insurance company opened an application fee account on April 22, 1997, the day after receiving a signed loan application with an application fee, as the lessor sought both a construction and a permanent loan (Government Exhibits 55 (¶¶ 3, 5), 56 at 5 (¶ 13)).

With this background of the Government’s insistence upon evidence of the lessor’s financial ability to perform, the parties signed a written lease on Standard Form 2, with April 14, 1997, as the stated date of lease. The document incorporates the terms of the solicitation noted above, although it notes the address of the city-owned lot (what was to be the actual site of construction) as the location of the subject construction. The standard form does not make a specific notation of the deletion or alteration of the provisions of the solicitation and contract that are noted above, as would be required under the Award clause. (Appeal File at 49, 67.) This formal lease was entered into at a time that a written lease was required by the lessor, and shortly before the Government would begin to occupy space in the second building identified in the lease agreement. At this time, although apparently unknown to the Government through the time of the termination for default, the lessor had submitted a loan application that indicated that the lessor was the owner of the property, although the lessor had not yet purchased the property that the city had agreed to sell. As stated in the minutes of the city council meeting, the sale had been approved with a payment structure of half down, the balance being finance[d] for up to six months at 8% interest, a due date of on or before June 1, 1997, and proof that Mr. Quayle has secured a construction loan.” (Government Exhibit 177, Exhibit 1 at 1.) The city council had not agreed to a sale to this lessor after that date.

On April 25, 1997, the lessor and Government discussed the financing for and completion of the building. The lessor indicated an expectation to close on the construction loan on May 2, 1997, based on receiving the signed SF-2 on April 25. The lessor also expected to complete construction within 6-8 months, so as to satisfy the tentative occupancy date of December 31, 1997, contained in the standard form. The lessor agreed to submit a building plan within one week of finalizing the plan, and to submit a construction schedule, based on a monthly timetable, by May 5. (Appeal File at 254-55.)

On May 9, 1997, the lessor and Government held a meeting. As memorialized in notes by the Government, to which the lessor did not indicate disagreement (such that I find the notes to accurately reflect the substance of the discussion), the lessor presented final plans for the main office building. The lessor stated that the construction schedule was not yet ready, as the lessor had not closed on the construction loan. The construction schedule had been due on May 5, the construction loan was to have closed May 2.

[The lessor] doesn’t want to submit a construction schedule until the financing is completed. [The Government] requested that [the lessor] go ahead with the construction schedule so that when the financing is in place, he can immediately proceed with the construction of the building. She also asked

that he proceed with acquiring the building permits so there is no further delay with beginning construction.

The Government “required that [the lessor] submit the construction schedule by 5/12 with a start date regardless of financing. [The lessor] agreed to do this.” Further, the Government indicated that it needed some documentation on the loan as soon as possible, by May 19, at the latest. (Appeal File at 199, 200, 203.)

On May 12, 1997, the lessor provided to the Government a construction schedule, “as per 3.9.” This schedule states for item three, “issuance of building permit”: “resubmission within 5 days of review and resolution of plans by [Forest Service] engineer.” For item four, completed construction drawings, the schedule states: “within 10 days of review and resolution of plans by [Forest Service] engineers.” This schedule does not identify a date for item five, the start of construction. Rather, it identifies December 31, 1997, as the date by which final construction will be completed, and identifies six “principal categories of work.” The first entry states:

(A) SITEWORK (15 DAYS)

COMPLETION LESS 180 DAYS[.]

At the bottom of the schedule is the statement: “All completion dates are subject to acceleration based on recording of construction loan.” (Appeal File at 198). The record does not demonstrate that, after the submission of this schedule and prior to the termination for default, the lessor accomplished substantive work at the site that would alter the projected sitework or other items in the schedule.

As of May 19, 1997, the lessor was uncertain of the status of financing through Equitable (Appeal File at 189, 193).

As of May 27, the Government learned that the lessor had applied for financing with Zions Bank. The individual from the bank indicated an expectation that the loan would be approved within about three weeks, and the bank employee was to be speaking with the appraiser. (Appeal File at 243.)

By letter dated May 30, 1997, the lessor informed the Government of the intent to comply with the lease by providing a building by December 31, 1997, and to follow the building schedule as submitted on May 12, 1997. The letter states: “In order to do so the building should be started near the first of July 1997.” Further, Equitable “has given me a date prior to that time for his recording of his loan on the property, thus allowing us to start construction by that date or sooner.” (Appeal File at 187.)

Cure Notice

By letter dated June 6, 1997, the contracting officer informed the lessor:

Based on your schedule, you were to apply for a building permit within 5 days of review and resolution of the plans by the Forest Service Engineer and submit completed construction drawings within 10 days of review and resolution of the plans by the Forest Service Engineer. The final review and resolution of the plans was completed during our meeting of May 19, 1997 in Richfield.

I have calculated dates for progress milestones in relation to the time schedule you provided the Forest Service. These dates reflect the time you indicated it would take to complete preparations and elements of construction:

Issuance of Building Permit	By May 24, 1997
Completed Construction Drawings	By May 29, 1997
Start of Construction/Site Work	July 5-19, 1997
Foundation	July 20-August 3, 1997
Framing/Techs	August 4-October 2, 1997
Drywall	October 3-November 2, 1997
Paint	November 2-December 1, 1997
Carpet	December 2-31, 1997

As of this date, we have not received the final construction drawings. You have not submitted a firm written commitment for project financing from your lending institution as required by the lease and as requested in our meetings of April 25 and again May 9, nor have you submitted any evidence that you have applied for, or obtained a building permit.

Your lack of progress has created serious concerns about whether you have the capacity to proceed, and are able to provide, a finished, professional office building by December 31, 1997. In your letter of May 30, 1997, you stated you would do as the lease required; however, you have already fallen behind on your schedule.

The Forest Service can no longer tolerate these delays and must get on with acquiring office space for our employees.

. . . .

This letter will serve as written notification that the Government considers your failure to submit final drawings, a firm written commitment for the financing of this project from your lending institution, and evidence of the issuance of a building permit from the City of Richfield as conditions that are endangering performance of the Supervisor's Office portion of the lease. Therefore, unless I have verifiable documentation in hand that these conditions are cured no later than 2:00 PM, on the tenth day after your receipt of this letter, the Government will terminate a portion of this lease for default under the terms

and conditions of the GSAR 552.270-28, Default in Delivery - Time Extensions (June 1994) clause of the lease.

In addition, should you be able to cure the condition cited above and fail to meet any of your construction milestone dates, it would be questionable as to your ability to complete the office by December 31, 1997. Therefore, this is your notice that should you fail to meet any of the completion dates established in your construction schedule as summarized above, I may terminate this contract for default without further cause.

(Appeal File at 38-39). The lessor received a copy of the cure notice on June 10, 1997 (Appeal File at 41). The acceptance on June 7, 1997, of the package containing the cure notice by a tenant, unrelated to the lessor, in the same building, without actual receipt by the lessor, does not trigger the cure period as defined in the letter. However, by letter dated June 12, 1997, to the lessor, the contracting officer emphasized the view that the cure period ended on June 17:

You are responsible for complying with the cure notice by submitting the items required in the manner you deem appropriate. To restate the cure notice requirement, we must have verifiable documentation in hand that the conditions specified in our June 6 letter are cured no later than 2:00 p.m., June 17, 1997, or we will terminate the Supervisor's Office portion of the lease for default[.]

(Government Exhibit 21.)

Default

On June 17, 1997, the lessor informed the contracting officer that it would receive a loan commitment by June 25, 1997, and that it expected to obtain the building permit the following week, around June 25 or June 26. The contracting officer had a subsequent conversation on the same day with counsel for the lessor. From these conversations, the contracting officer concluded that the lessor was acknowledging its inability to satisfy the requirements identified in the contract and emphasized in the cure notice. (Appeal File at 227.)

In a letter dated June 18, 1997, to the contracting officer, the lessor's attorney provides a status report. This letter specifies that a building permit has not been obtained, final plans have not been approved, and a loan commitment has not yet been obtained. The letter notes the lessor's view that the deadline for completing each item is before construction begins. Regarding obtaining financing, the letter states: "The bank is still vacillating on your project, and Mr. Quayle is continuing to work with the bank on both takeout and construction loans. Mr. Quayle also submitted an application to an insurance company that has advised him they are days away from the final approval of the project." "On the subject of deadlines, included within the schedule Mr. Quayle provided to you last month is over thirty days of

'cushion.' Years of experience has taught him that 'cushion' time should always be included in a building schedule for the little emergencies that all too often arise. If a more detailed schedule would help reassure you, we will provide one." (Appeal File at 35.)

By letter dated June 18, 1997 (a Wednesday), the contracting officer informed the lessor:

Reference my June 6, 1997 letter which was delivered on June 7. The ten-day cure notice period expired on June 17 at 2:00 p.m. In our telephone conversation yesterday, June 17 at 1:20 p.m., you stated that you would be unable to furnish final construction drawings, a firm commitment for financing or evidence of the issuance of the building permit for the Supervisor's Office portion of this lease, as required by my cure notice, until sometime during the week of June 23. This timeline is not acceptable according to your own construction schedule. You stated that you would be working on an accelerated schedule but you have provided no evidence to show how you would accomplish the project by December 31, 1997.

Because you have failed to cure the deficiencies, this is your notification that the Supervisor's Office portion of [the lease] is hereby terminated under Clause GSAR 552.270-28, . . . effective today.

(Appeal File at 29.)

The lessor treated the notice of termination for default as legally invalid, having been issued before the cure period expired. As Mr. Quayle states in an affidavit:

Because Omni received the cure notice on June 10, 1997, I believed that the government could not terminate the lease until after 2:00 PM on June 20, 1997, at the earliest. I relied on this ten-day period as I proceeded to secure construction financing for the project and to make other arrangements to start construction by early July.

(Lessor Exhibit 67 at 31 (¶ 89).) However, the lessor failed to inform Government by 2:00, June 20, the tenth day after receipt of the written cure notice, that it had complied with the requirements expressed in the cure notice. As stated below, through July 1997, the lessor was indicating to the Government that it had yet to secure the financing required to commence construction. By the end of the cure period, the lessor had not satisfied the items identified in the cure notice. Also, at that time, it lacked a written agreement approved by city council to purchase the underlying land. I need not explore how that lack of a written agreement may have hampered the ability to obtain a firm commitment for financing or may have delayed other aspects of the lessor's progress.

On June 23, 1997, the lessor informed the contracting officer that it was still actively arranging for financing and anticipating the commencement of construction in early July (Lessor Exhibit 67 at 31 (¶ 97)). With this information, the only reasonable conclusion the

contracting officer could reach was that the lessor still lacked a firm commitment of financing. I find as fact that, by the end of the cure period, the lessor lacked a firm commitment of funds. At best, it had obtained a conditional commitment, but did not relay this information to the Government.

In a letter dated June 25, 1997, to the lessor, a company specifies that it confirms receipt of a signed loan application agreement dated June 19, 1997. The letter informs the lessor that its loan proposal meets the basic underwriting criteria; it asks the lessor to submit a written commitment and signed lease from the Government to occupy the building upon completion of the facility. The letter states that the terms of the loan application agreement are not yet complete. (Appeal File at 23.)

In a letter dated June 26, 1997, to the lessor, a financial corporation (not that in the above paragraph) states that it “commits” to permanent financing with an interest rate and other terms to be negotiated at the time the lessor makes formal application. “This commitment to provide permanent funds, is of course, contingent upon your being the successful bidder on the proposed lease with the U.S. Forest Service. Further, our commitment to lend funds will be subject to a lease with the U.S. Forest Service, providing annual net income sufficient to pay debt service that yields a minimum debt coverage ration of 1.10 to 1.” However, no loan application had been submitted at that time. (Appeal File at 24.)

These two attempts by the lessor belatedly to obtain a firm commitment for financing further demonstrate that it lacked the requisite commitment as of the end of the cure period. Neither response to the loan requests represents a firm commitment of funds. Moreover, without a firm commitment, the lessor was not in a position to progress with construction. Even while viewing the termination for default as invalid, the lessor was unable to obtain financing and opted not to construct the building.

By letter dated August 26, 1997, the contracting officer responded to a letter from the lessor’s counsel, dated July 25, 1997 (Appeal File at 17-25); the response states, in part:

[L]et’s assume the [cure] notice was not effective until June 11 and the cure period expired on June 22, as you claim. Your client did not cure the default. The enclosures provided by your office are not firm written commitments of project financing from a lending institution. Upon review, these letters are from two new finance companies. The Forest Service has previously received different letters with similar language from two other finance institutions. The letter from Federal National Finance Corporation is dated June 26, 1997. The letter from MIC Corporation is dated June 25, 1997. Mr. Quayle did not apply for a loan with this company until June 19, 1997. Based on your argument, had we given Mr. Quayle till June 22, a loan was not approved.

(Appeal File at 14.) Because the lessor did not indicate that a firm commitment for funding had been obtained as of the date of the letter, during a period that the lessor viewed the default to be invalid, the Government could reasonably draw the conclusion that a firm commitment did not exist and construction could not have begun until, at the earliest,

several days after July 25, 1997. Thus, by its own communications, the lessor has established it was not in a position to begin construction before the start of August 1997, at the earliest. The lessor's communications with the Government and the lessor's own schedule do not provide assurance that construction could be complete within five months, the time remaining before the projected occupancy.

On September 10, 1997, the Board received a notice of appeal, docketed as AGBCA No. 97-203-1, submitted by the lessor, contesting the termination for default of the main office portion of its lease. On July 10, 1998, the Board received a notice of appeal, docketed as AGBCA No. 98-182-1, submitted by the lessor. The lessor disputes the denial by the contracting officer of its claim for \$2,203,767.25, said to represent expenses and lost profits resulting from what the lessor describes as the improper and legally invalid termination for default of its lease.

I Termination for Default

In the notice of termination for default, the contracting officer states that the lessor has failed to cure the deficiencies identified in the cure notice, and has provided no evidence to show how it would accomplish the project by December 31, 1997. The notice references the Default in Deliveries clause of the contract.

A stated reason for the default determination is the lessor's failure to make progress, with that lack of progress endangering performance. As the Federal Circuit has directed, the test formulated in Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987), controls the determination of whether the government justifiably default terminated a contractor for failure to make progress. The court states, "In applying that standard, we have required that the contracting officer's termination decision be based on tangible, direct evidence reflecting the impairment of timely completion. In other words, a court's review of default justification does not turn on the contracting officer's subjective beliefs, but rather requires an objective inquiry." McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1016 (Fed. Cir. 2003) (citations omitted). This Board is not limited to the contracting officer's testimony and contemporaneous documents; the Board may consider the lessor's failure to meet progress milestones and financial situation, and other pertinent circumstances surrounding the decision in order to determine whether the contracting officer had a valid basis for the conclusion. "Thus, the trial court should focus on the events, actions, and communications leading to the default decision in ascertaining whether the contracting officer had a reasonable belief that there was no reasonable likelihood of timely completion." McDonnell Douglas, 323 F.3d at 1017.

The record demonstrates that, prior to the end of the cure period, the lessor provided the contracting officer with no assurances, but only further promises. Thus, by the end of the cure period, the lessor lacked and did not provide to the contracting officer proof of a firm commitment of financing. It also had failed to obtain or provide approved building plans or a building permit. These failings demonstrate the lessor's inability to abide by its own schedule. Moreover, the lessor did not provide any assurance that it could accomplish these tasks and complete construction within the time remaining before occupancy. Most specifically,

the lessor continued, at best, simply to promise that in upcoming days it would have financing in place, as well as a building permit, and final construction drawings, or as conveyed by counsel for the lessor, that each task would be completed before construction began. The lessor provided no construction plan to accommodate an actual start date as projected based on the information available during the cure period. The suggestion by the lessor (through counsel) that the lessor could utilize the entire “cushion” built into the schedule before construction began, offers no reasonable assurance that the lessor will be able to complete construction to permit timely occupancy, given the stated expectation that matters will arise during construction that will require additional time to resolve. (Even Mr. Quayle testified that as of June 19 or 20, he understood that he had to commence construction by July 5, 1997, in order to provide occupancy by December 31, 1997 (Transcript, July 11, at 80-82). Given what remained for the lessor to accomplish, such a date was not attainable at the end of the cure period.) Further, the lessor did not account for the lack of a binding agreement to purchase the underlying property. What is most significant is that without a firm commitment of funding, the project would not move forward or be completed. Universal Fiberglass Corp. v. United States, 537 F.2d 393, 398 (Ct. Cl. 1976) (inadequate financing can be the reason a contractor fails to make progress). All of the available information provided no assurance that funding would be available; at best, the information provided support for the conjecture that funding could become available. The contracting officer reached a reasoned determination. The termination for default is supported at the time of the termination, at the end of the cure period, and upon revisiting the issue in August 1997, in response to concerns raised by the lessor. The Government has satisfied its burden of proof justifying the termination for default.

When the contracting officer issued the notice of default termination, the lessor had stated that it could not satisfy the requirements identified in the cure notice by the end of the cure period and the lessor provided no schedule indicating that it could provide timely occupancy. The lessor’s failures and lack of positive assurances provided a sound basis for the termination for default. Although the contracting officer issued the notice before the cure period had ended, the termination for default was valid under the analysis required above and as expressed in other case law:

The law of government contracts has adopted that doctrine [of anticipatory repudiation], expressing it as a requirement that the contractor give reasonable assurances of performance in response to a validly issued cure notice. That rule, as the Restatement explains, rests “on the principle that the parties to a contract look to actual performance ‘and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain.’”

Danzig v. AEC Corp., 224 F.3d 1333, 1338 (Fed. Cir. 2000) (citations omitted). The contracting officer did not have to await further submissions. In any event, the lessor treated the notice as invalid, and did not provide sufficient assurance before the end of the cure period. For several weeks, the lessor communicated its lack of a firm commitment of funding.

The default is also fully justified under the Default by Lessor clause. That clause specifies that repeated and unexcused failure by the lessor to comply with requirements of the lease shall constitute a default. In this instance, the lessor failed to comply with the requirement to provide proof of a firm commitment of financing. These failures occurred after repeated requests by the contracting officer for compliance, and promises by the lessor that matters would be completed by given dates. The lessor's demonstrated inability to complete this task essential and preliminary to further progress, justified the termination for default. Empire Energy Management Systems, Inc. v. Roche, 362 F.3d 1343, 1356 (Fed. Cir. 2004) (citations omitted) ("Our decisions have consistently approved default terminations where the contracting officer's ground for termination was not sustainable if there was another existing ground for a default termination, regardless of whether that ground was known to the contracting officer at the time of the termination."). Here, the stated reason for default is sustainable as well.

The majority errs in concluding that the lease contains no enforceable requirements that precede the delivery of space ready for occupancy. Consistent with the solicitation and proposal, the Government made an award based upon an agreement containing requirements for the submission of proof of a firm commitment of funds and of schedules for construction. The Standard Form 2 written agreement, incorporates the provisions of the solicitation, without altering or deleting any of the here-pertinent provisions. In the context of the on-going communications between the parties, both before and after the signing of the Standard Form 2 document, it is evident that the Government was attempting to compel compliance with the requirement for funding, while requiring the lessor to comply with its own schedule regarding the submission of approved plans and a building permit. Further, given the No Waiver clause, even without the on-going attempts by the Government to enforce specific requirements of the lease pre-dating and post-dating the signing of the formal lease agreement, the Government could require the lessor to provide evidence of a firm commitment of financing. It did this explicitly through the cure notice, which established a reasonable time for compliance given the extended period over which the lessor had promised compliance. In response, the lessor indicated its inability to comply within the cure period; in fact, the lessor did not obtain a firm commitment of funds.

Despite references to the analysis required under Lisbon, the majority utilizes a subtly, but significantly, different standard. The majority concludes that the lessor could have started construction as late as early August and still could have the building timely ready for occupancy. Therefore, it follows for the majority that this lessor could not be terminated for default unless the Government demonstrates that the lessor could not complete each of the tasks identified in the cure notice to permit the start of construction by that date. This analysis demands that the contracting officer be absolutely certain that timely completion is no longer possible. It does not permit the contracting officer to establish a reasonable belief of the lessor's inability to timely complete, as it requires the contracting officer to ignore the context in which the cure notice was issued and the response of the lessor, as well as the silence in terms of the lessor's failure to provide a construction schedule that identified a method of performing within the time remaining. By implication of the decision here, the

majority would uphold a termination for default only after it became impossible for the lessor to complete construction in a timely manner. Such a reading of the default clause is inconsistent with the language of the clause and the case law. Lisbon at 765 ("We agree that the contractual language found in General Provision 5 does not require absolute impossibility of performance by the contractor before the government may declare the contract in default"). The contracting officer can seek assurances of timely performance; the Government need not wait until late July or early August, through iterations of unfulfilled lessor promises, to take action to ensure that the Government will have space for occupancy by the promised date. In short, this termination for default must be upheld if the Government was justifiably insecure about the lessor's ability to provide timely occupancy--unfulfilled promises, silence, and failures to meet deadlines of the contract and schedule are relevant to the analysis, which need not focus solely on the remaining time to complete.

The on-going concerns of the Government, questioning the lessor's ability to satisfy the lease requirements timely, find support in the actions and conclusions of the one bank that completed the loan process with the lessor prior to the expiration of the cure period. Rather than provide a firm commitment for funding, the bank declined a loan to this lessor because the proposed construction did not satisfy the lending criteria of the bank. In a letter dated June 10, 1997, to the lessor, the bank states that "our concerns relate to the overall weakness of the package during the course of construction. Specifics include the lack of experience and financial strength of the contractor which was presented, lack of case equity in the project, the amount of sweat equity required to complete the project, and the lack of liquidity of the guarantors." (Government Exhibit 50.) This Board need not ignore this bank's conclusions, which lend outside, unbiased support to the reasonableness (and credibility) of the determination of the contracting officer.

A contracting officer is not tasked with prescience; a contracting officer need not passively accept unsubstantiated promises. In light of unfulfilled lessor promises, this contracting officer issued a cure notice in order to obtain assurances that this lessor would construct the building to permit timely occupancy. Sufficient assurances were not provided, as I conclude here and as I had concluded in dissent on cross-motions for summary judgment. Omni Development Corp., AGBCA Nos. 97-203-1, 98-182-1, 01-2 BCA ¶ 31,487. Despite the apparent heartfelt beliefs of Mr. Quayle, expressed in his affidavit and testimony, the contracting officer had justifiable insecurities while remaining unconvinced that the lessor could perform this aspect of the lease, when the lessor indicated that it would not obtain a firm commitment of funds, a building permit, and approved plans by the end of the cure period, and the lessor did not indicate how it could accomplish performance within the remaining time. I find no case law that suggests that one should invalidate the termination for default under these circumstances. A contracting officer is not compelled to put at risk the Government's ability to obtain requisite space, when a lessor has failed to satisfy the requirements of a contract and a cure notice, and whose actions up to that point in time indicate an inability to complete promised tasks.

II Breach Damages

As specified in its post-hearing brief, the lessor seeks total damages of \$2,193,066, comprised of \$162,883 for the anticipated net rental income for the ten-year base period of the lease, and \$2,030,183 for the reversionary value of the building (Lessor's Post-Hearing Brief at 109).

Assuming that the termination for default was not valid, and constituted a breach of the contract, the lessor is entitled to recover damages. However, the lessor must establish that the expenses or anticipated profits arose under the lease and related to the breach. Under the contract, the Government was obligated to pay the lessor \$10.44 per square foot for a maximum of 25,661 square feet of space. This obligation covered the ten-year firm term of the lease. (Appeal File at 49-50.) The Adjustment for Vacant Premises clause of the lease is explicit regarding the obligations of the parties should the Government not occupy any portion of the leased premises:

If the Government fails to occupy any portion of the leased premises or vacates the premises in whole or in part prior to expiration of the firm term of the lease, the rental rate shall be reduced as follows:

The rate shall be reduced by that portion of the costs per square foot of operating expenses not required to maintain the space. Said reduction shall occur after the Government gives 30 days prior notice to the Lessor, and shall continue in effect until the Government occupies the premises or the lease expires or is terminated.

(Appeal File at 68 (¶ 3.7).)

In its post-hearing brief the lessor scarcely addresses the alleged entitlement; it does not address the calculation of its rental damages. This lessor never constructed the building and never made any of the space available for rental. Prior to the notice of the termination for default, the lessor did not commit itself to borrowing funds; without financing this building would not have been constructed. The lessor did not own the underlying property, or have an existing agreement to purchase that property at the time of the assumed Government breach. The conclusions of the bank expressly denying the loan request (Government Exhibit 50), highlight potential problems with the proposed project. Based on the record, I conclude that this lessor would not have completed construction to permit timely occupancy, such that projected relief for lost rental and a reversionary value is sufficiently speculative and must be denied.

Even if one concludes that the lessor could have constructed the building and assumes figures in favor of the lessor, that the Government would lease the maximum of 25,661 square feet of space, with annual operating costs of \$1.48 per net usable square foot (Appeal File at 50), and annual other costs for insurance, taxes, building maintenance and reserves, and management of \$.78 (at \$20,000 per year) (Appeal File at 111), the record does not establish that the lessor would have profitably rented the space for the ten-year term, given the need to borrow and repay loans (\$9.87 per square foot for \$1.7 million over

ten years at 8.55%). Not only is the timely completion the project speculative, but the figures indicate that the lessor would not have profited from the firm term aspect of the lease. Because the lessor has not established that it would have a positive income through the rental period, the requested anticipated profits under the lease should not be awarded.

On this matter of lost rental income, I agree with the majority. Although the lessor is entitled to expected rental income less expenses, the record does not establish that the lessor would have rented the space at a profitable rate over the ten-year lease. However, I am unconvinced that this lessor could have timely constructed the building; this serves as a primary, but separate, basis for denial.

III Reversionary Value

The majority is innovative in awarding the lessor a reversionary value (the projected price that the building would sell for in 2007 less the projected cost to sell the building, adjusted to a present value) as breach damages for a building never constructed. Such a conclusion is inconsistent with the contract and case law for several readily apparent reasons. I need not address the speculative nature of the awarded reversionary value and the underlying bases for valuing the unconstructed building, on an undeveloped piece of property, with imaginary tenants at conjectured rental rates, which separately supports why recovery of a reversionary value is inappropriate.

Under the lease contract, the Government rents space for a fixed period of ten years, with two option periods (the Government is not obligated to occupy the space). The lease is silent regarding the overall size and value of the building as a whole (other than to specify size, finish, and ancillary requirements for and relating to the Government-rented space). The solicitation did not demand that a building be newly constructed. As noted above, the terms of the lease limit the Government's obligations to pay the lessor for the ten-year life of the lease, less operating expenses not required to maintain the space. The Government does not acquire an interest in the underlying building or property; the lessor does not need to possess an interest in the building after the conclusion of the lease. Nothing in the solicitation suggests that the Government's liability would vary with the size or value of the building, or if the space being offered was existing or to be constructed; the Government's liability under the lease is calculated on a square footage basis. Read as a whole, the lease terms establish that the Government did not contemplate a liability for the underlying value of the building at any point in time. There is no basis to impose a liability on the Government for damages not contemplated under the terms of the lease contract.

Had the lessor constructed the building and the Government never occupied the space, the lessor would not be entitled to a reversionary value under the terms of the lease. Under such a circumstance, with respect to the reversionary value of the building, the lessor would be in the same position it would have been at the end of the lease term had the Government occupied the space. Having not constructed the building, the lessor has not demonstrated why it should be placed in a better position than if it had constructed the building.

Apart from the limits of the Government's liability under the lease, at the time of the breach this lessor retained whatever assets (such as time and money) would have been expended on the building; it could utilize those assets to construct the given building or another structure, or to otherwise invest. To award the reversionary value, without the expenditure of the money and time and risks, while permitting the lessor to otherwise allocate its resources represents a windfall recovery. That is, by awarding a reversionary value of the building under these circumstances, the lessor obtains projected profits without having expended the requisite resources, while it was able to expend the dollars and time no longer needed after the termination for default on generating incoming. This places the lessor in a better position than it would have been had no default or breach occurred.

Support for the conclusion that it is inappropriate to award a reversionary value for the unbuilt building is found in Wells Fargo Bank, N.A. v. United States, 1012, 1022-24 (Fed. Cir. 1996), and the case quoted therein, Ramsey v. United States, 101 F. Supp. 353, 357-58 (Ct. Cl. 1951) (footnote omitted):

In actions for breach of contract the damages are ordinarily limited to the natural and probable consequences of the breach complained of, and the damages remotely or consequently resulting from the breach are not allowed.

. . .

. . . .

The profits lost from the corporation's over-all business activities, because of its shortage of capital allegedly occasioned by the Government's failure to pay the contract amounts when due, may not be recovered either. It is important to bear in mind that the corporation's claim is not for the anticipated profits of the contracts in question, but is a claim for the anticipated profits of its entire business enterprise. The lost profits of these collateral undertakings, which the corporation was unable to carry out, are too remote to be classified as a natural result of the Government's delay in payment. The statement of this court in Myerle v. United States, [33 Ct. Cl. 1, 26], fully disposes of this claim: "*** * *** But we think there is a distinction by which all questions of this sort can be easily tested. If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfillment, then they would form a just and proper item of damages, to be recovered against the delinquent party upon a breach of the agreement. These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit."

This case, Ramsey, is approvingly quoted in Northern Helex Co. v. United States, 524 F.2d 707, 720-21 (Ct. Cl. 1975), which notes that there is to be no recovery for general loss of business, losses of overall net worth, or losses on non-federal work; remote and consequential damages are not recoverable. Although this lessor embarked upon the proposed construction to satisfy the terms of the lease, the reversionary value represents an independent and collateral undertaking; the reversionary value reflects a hoped for anticipated profit of the lessor's business enterprise, not a profit arising under the lease contract. The projected future profits, reflected in the reversionary value derived from the income approach, are not recoverable as a result of the Government breach found.

The majority references cases that it recognizes are not directly on point, but suggests that the cases confirm a position of the majority that the value of a leasehold property is the value of equity at the end of the lease as well as the on-going cash flow. Of significance here, this lessor owned neither the proposed building nor the underlying property at the start of the lease or at the time of the termination. At the time of the termination, the lessor also lacked a written agreement from the city that would ensure the sale of the property to the lessor. Unlike the majority, I find no support for the proposition that reversionary value is a recoverable damage against the Government when the Government breaches a lease as here found by the majority.

Putting aside the above-discussed differences with the majority, while assuming that the lessor is entitled to recover a reversionary value of the building, the majority also errs by utilizing as the basis for recovery the reversionary value for the building as is projected for 2007, the end of the firm term of the lease. The "proper" valuation should be as of the date of found breach, June 17, 1997, or the date of projected occupancy, December 31, 1997. Consistently applying the logic of the majority requires one to conclude that the breach disabled this lessor from constructing the building and, therefore, the lessor never was able to enjoy the benefits of the building. Those "benefits" would include the seemingly unprofitable ten years of the firm term of the Government lease. To calculate an award based only on projected years of profitability, represents a myopic view that improperly favors the lessor.

In deeming the termination for default to be invalid, and in finding a breach of the contract by the Government which obligates the Government to compensate this lessor for the projected reversionary value of the building never constructed, the majority errs factually and legally as it establishes an unworkable precedent for the Government in administering lease contracts.

JOSEPH A. VERGILIO

Administrative Judge

Issued at Washington, D.C.

AGBCA Nos. 97-203-1 and 98-182-1

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May 25, 2005